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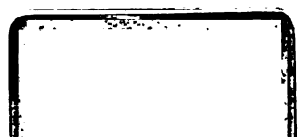
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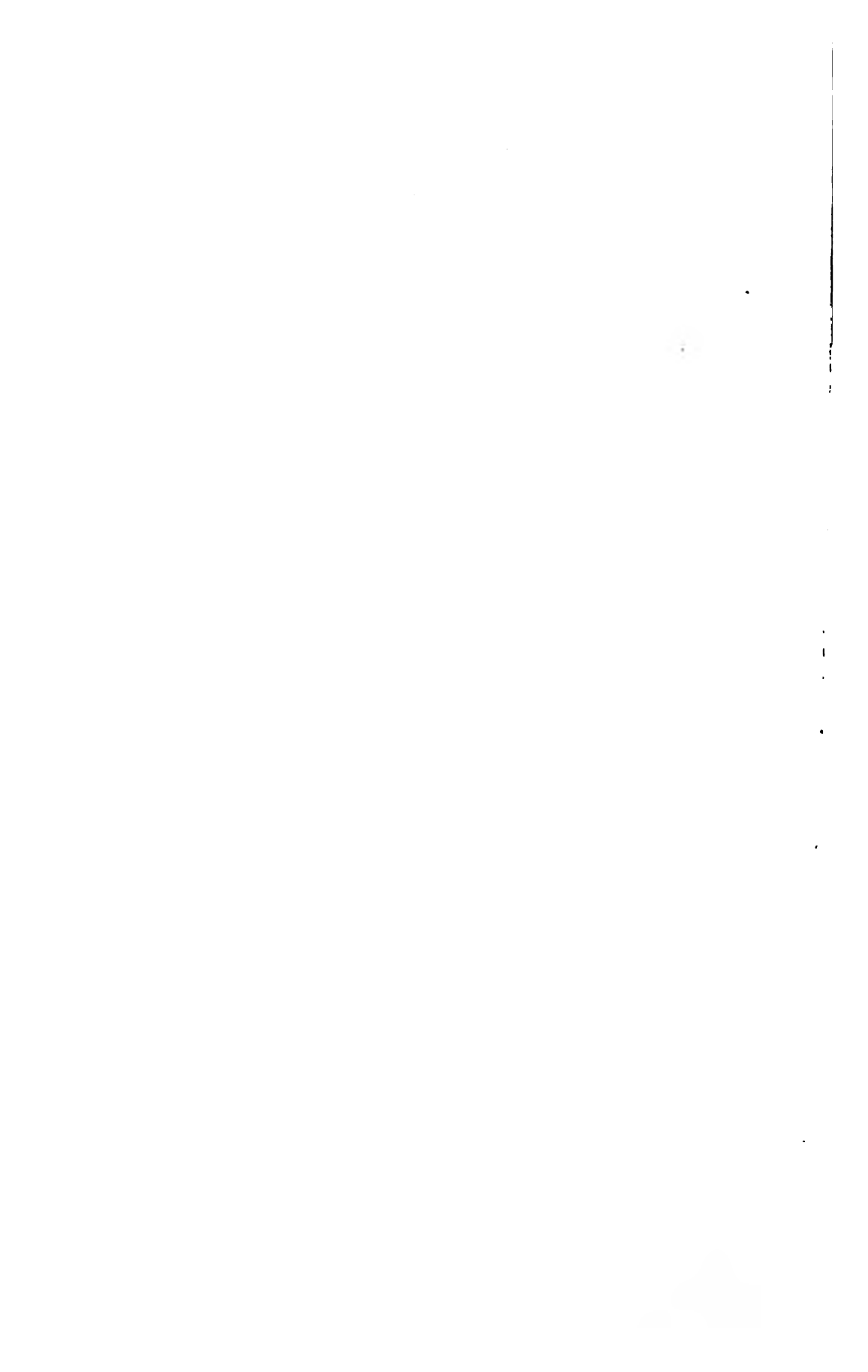












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W. H. HURTBERGER,  
ATTORNEY,  
GEORGE W. TOLESON, S.S.



THE LAW AND PRACTICE  
IN  
BANKRUPTCY

BY  
ORLANDO F. BUMP

---

REVISED AND ADAPTED TO THE BANKRUPTCY ACT OF  
JULY 1, 1898,

BY  
EUGENE WILLIAMS, B. L.

MEMBER OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES AND OF  
THE SUPREME COURT OF TEXAS.

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ELEVENTH EDITION.

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## PREFACE TO THE ELEVENTH EDITION.

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This revision contains references to all cases reported construing provisions in former laws so far as they are analogous to those of the act of July 1, 1898.

Mr. Bump's comments upon the law of March 2, 1867, and amendments thereto, have been expunged, as in many instances they would be misleading when applied to the present law.

No editorial construction has been attempted explanatory of the existing statute, in recognition of the fact that since Mr. Bump wrote, lawyers have been less and less inclined to regard opinions of text-writers on acts of Congress except when supported by judicial construction.

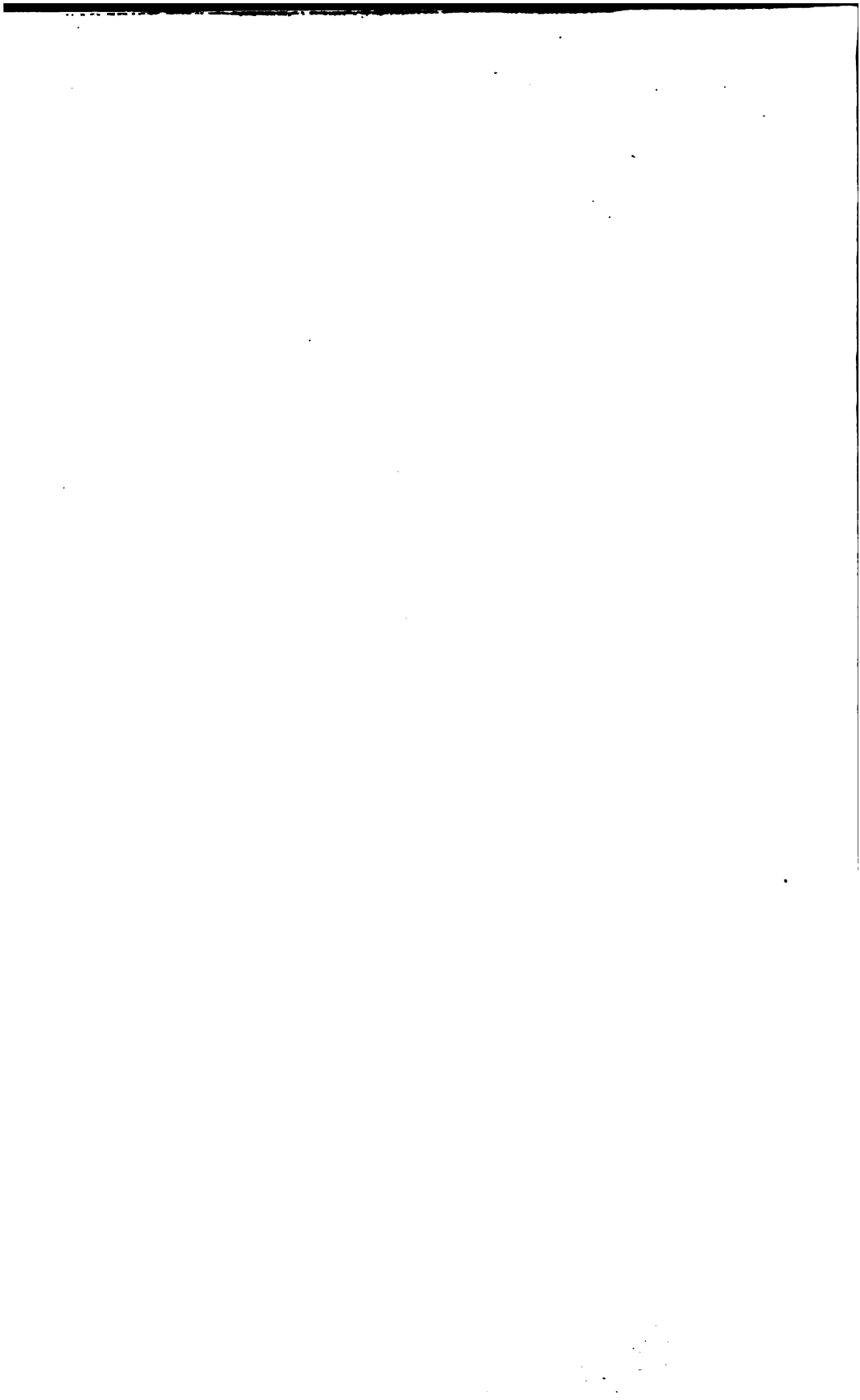
No claim is made for this work other than that it states the entire law of bankruptcy as it now exists, and as it has existed from time to time since the first act was passed in 1800, and that it cites every decision rendered by the bankruptcy courts of the United States and many from other courts which would assist the practitioner in forming an accurate conception of the true meaning of the law now in force.

The preface of Mr. Bump to his tenth edition will apply with greater force to this revision, since nothing of importance to the law of 1898 has been taken from — though much has been added to — the main body of his work, adapting it to the law and practice under that act.

The reviser respectfully requests judges, referees and lawyers to extend the same consideration in calling his attention to defects and errors in the work for which Mr. Bump, with reference to former editions, took opportunity to return his thanks.

EUGENE WILLIAMS.

WACO, TEXAS, August 1, 1898.



## PREFACE TO THE TENTH EDITION.

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This edition contains references to all cases reported to September 1, 1877. The whole work has been carefully revised so as to correspond with the late important decisions. The references have also been carefully verified so as to eliminate all errors that may have crept in from inadvertence or from mistakes incident to successive editions. Inaccuracies in language and conclusions not drawn with sufficient care, have been corrected. In fine, no pains have been spared to make the work worthy of the approbation which the profession have thus far accorded to it. The aim has been to make a practical, not a theoretical work, to show what is established, not what may be decided, to follow rather than anticipate decisions, to furnish a practical guide rather than brilliant theories. This plan, though not as tempting as others that might have been pursued, has stood the test of trial and met with approbation.

In this edition, all the cases decided under the acts of 1800 and 1841, so far as they are applicable, have been cited, and the work now contains references to all which are of any value that have ever been decided in this country. In this particular it is superior to any former edition. The greater part of that which has been added pertains not to the practice in bankruptcy, but to collateral questions arising out of bankrupt cases, such as constitutional law, the rights of the assignee, suits to recover *choses in action*, the limitation of two years, and the effect of a discharge — in a word, the very questions which are now arising in the State courts. A glance at the topics indicated will at once show the fullness of the citations and the value of the additions.

In this edition the citations from the Bankrupt Register are all taken from the octavo volumes, and the references are accordingly made to the reprint and not to the original quarto volumes. The Bankrupt Register has taken its place among the regular reports, and the author has deemed it best to refer to that edition which will hereafter be most frequently used.

The author takes the opportunity to return his thanks to those judges, registers and lawyers who have called his attention to new decisions and to defects or errors in his work, and to request similar favors from the profession generally. Those who examine only one particular point, will, from the very nature of the case discover defects, which others taking a survey of the whole field would not perceive. It is only by the combined efforts of all that a harmonious and symmetrical system can be developed.

ORLANDO F. BUMP.

BALTIMORE, *September 1* 1877.

## ABBREVIATIONS USED IN THIS WORK.

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Abb. C. C.	Abbott's United States Reports.
A. L. J.	Albany Law Journal.
A. L. Reg.	American Law Register.
A. L. Rev.	American Law Review.
A. L. T.	American Law Times.
Ben.	Benedict's Reports.
Biss.	Bissell's Reports.
B. R.	Bankrupt Register.
B. L. T.	Baltimore Law Transcript.
C. L. B.	Cincinnati Law Bulletin.
C. L. N.	Chicago Legal News.
Cent. L. J.	Central Law Journal.
I. R. R.	Internal Revenue Record.
Lans.	Lansing (N. Y.).
Leg. Int.	Legal Intelligencer.
L. L. J.	Louisiana Law Journal.
L. T. B.	Law Times Bankrupt Reports.
Mich. L.	Michigan Lawyer.
Mon.	Montana.
N. Y. Sup.	New York Superior Court Reports.
N. Y. Supr.	New York Supreme Court Reports.
Pac. L. R.	Pacific Law Reporter.
Pitts. L. J.	Pittsburgh Legal Journal.
Sween.	Sweeny (N. Y.).
s. c.	Same Case.
W. J.	Western Jurist.
W. N.	Weekly Notes.
Wool	Woolworth.



**THIS TABLE**  
**CONTAINS A LIST OF THE BANKRUPTCY LAWS SHOWING THE TIME**  
**OF REPEAL AND THE PART OF THE REVISED STATUTES WHERE**  
**AN ANALOGOUS PROVISION MAY NOW BE FOUND.**

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" "	263	2	16	276	" "	"	5021.
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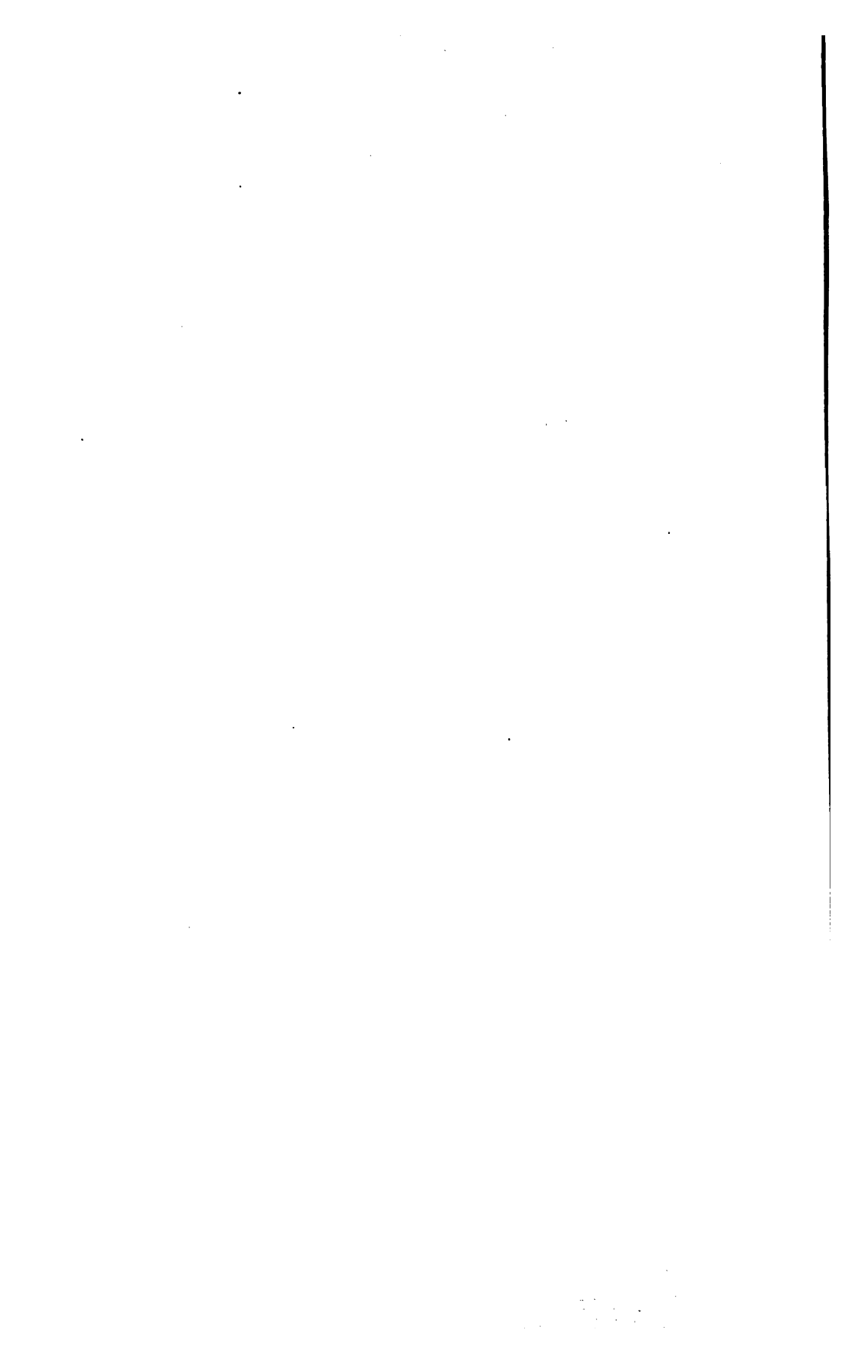
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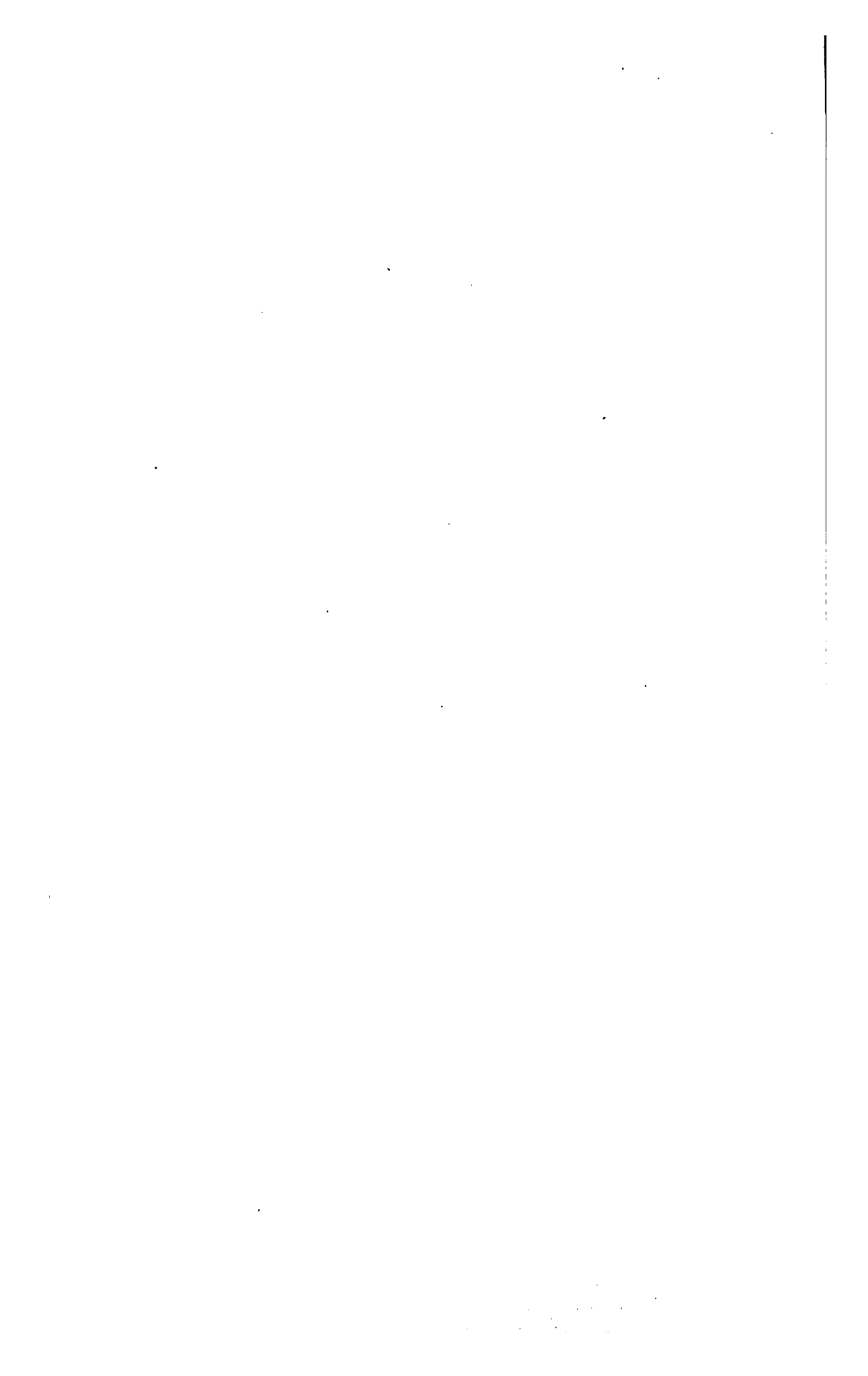
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# INTRODUCTION.

## BANKRUPTCY LAWS.

**I. Bankruptcy in the United States.**— Since the adoption of the Constitution of the United States, providing that “Congress shall have power to establish uniform laws on the subject of bankruptcies”, and prior to the recent act of 1898, establishing such system, three other enactments on the subject have been passed by Congress; the first, during the administration of John Adams, on April 4, 1800, repealed December 19, 1803; the second, during the administration of John Quincy Adams, on August 19, 1841, repealed March 3, 1843, by the same Congress which enacted it; and the third, during the administration of Andrew Johnson, on March 2, 1867, (and amendments thereof) repealed by the act of June 7, 1878, which by its terms did not take effect until September 1, 1878.

While in force, the law of 1867 was amended by the acts of

July 27, 1868 (15 Stat. 227);

June 30, 1870 (16 Stat. 173);

July 14, 1870 (16 Stat. 276);

June 8, 1872 (17 Stat. 334), being declaratory of the true intent and meaning of section 2 of the law of 1867;

February 13, 1873 (17 Stat. 436);

March 3, 1873 (17 Stat. 577), being also declaratory in its purpose;

And (the most important) June 22, 1874;

Act February 18, 1875 (18 Stat. 320);

The act of July 26, 1876 (19 Stat. —);

February 27, 1877 (19 Stat. 252).

Included in the repealing act which took effect September 1, 1878, were the acts of June 22, 1874, and the seven others amendatory of the law of March 2, 1867; thus erasing from the books all bankruptcy statutes of federal origin. Since this time, until the enactment of the late law, state laws then existing but until then suspended, together with those afterward enacted, have prescribed the rights of, and practice concerning, insolvents.

The present act took effect July 1, 1898, and marks a new period in the history of this interesting subject, interesting alike to the public,

the creditor and the bankrupt; to which latter class the past seventeen years of new business methods and speculative tendencies have consigned many honest men, whose return to their accustomed avocations will prove beneficent not alone to themselves, but to their former creditors and the country at large.

This work will present the law as it now is, quoting freely from the law of 1867 and the decisions of courts of bankruptcy, construing its provisions so far as they tend to elucidate the act of 1898.

**II. Bankruptcy in England.**— Numerous early statutes were passed by the Parliament of England relating to bankruptcy, among the most important being the act of 6 George IV, chapter 16, of date the 2nd of May, 1825, which consolidated the law into one act, and repealed the following statutes:—

34 and 35 Henry VIII, chapter 4;

13 Elizabeth, chapter 7;

1 James I, chapter 15;

21 James I, chapter 19;

13 and 14 Charles II, chapter 24;

10 Anne, chapter 15;

7 George I, chapter 31;

5 George II, chapter 30;

19 George II, chapter 32;

24 George II, chapter 57;

4 George III, chapter 33;

36 George III, chapter 90;

37 George III, chapter 124;

45 George III, chapter 124;

46 George III, chapter 135;

56 George III, chapter 137;

1 George IV, chapter 115;

3 George IV, chapter 74;

3 George IV, chapter 81;

5 George IV, chapter 98.

The act of 6 George IV, chapter 16, remained in force until modified by statutes 1 and 2 William IV, chapter 56; and until 5 and 6 Victoria repealed all laws inconsistent with this later act.

By statutes 1 and 2 William IV, chapter 56, and letters-patent pursuant thereto, a Court of Bankruptcy was established, consisting at first of a chief judge and three associates, and six commissioners,

though the number of judges was afterward reduced by statutes 3 and 4 William IV, chapter 47, section 7; and 5 and 6 William IV, chapter 29, section 21.

Previous to the establishment of this Court of Bankruptcy, the Bankruptcy Law in England was administered by commissioners appointed by the Lord Chancellor, under the great seal, as provided by 13 Elizabeth, chapter 7.

In 1842 there were established seven district courts under 5 and 6 Victoria, chapter 122, located, by an order in council, at Manchester, Leeds, Liverpool, Birmingham, Bristol, Exeter and Newcastle. By subsequent acts these were reduced; and finally, by the bankruptcy act of 1869, those remaining were abolished, and the business assigned in part to the registrars of each court, and the residue to the London Bankruptcy Court or a county court.

**Act of March 2, 1867.** — Just previous to this period in the English law, our act of March 2, 1867, was passed; and a comparison of the two statutes discovers many provisions of a similar nature.

The scope of this work will not permit even a hurried presentation of the English system; but a recital of the act of 1867, as amended, will become necessary, that the adjudications of our bankruptcy courts may be collated; thereby anticipating the probable construction which will be placed by judicial opinion upon like provisions of the act of 1898.

**Source of Bankruptcy Laws.** — This hasty retrospect of the laws of bankruptcy discloses their source in the early English statutes, and a series of parliamentary acts, until that of 6 George IV gave form to a more thorough revision and repeal of all preceding laws.

In the United States, originating with the act of 1800, as previously stated, four laws have been passed, the enforcement and construction of the first three and the existence of the last creating the history of American jurisprudence on this important branch of the law pertaining to insolvents.

Whilst all laws of bankruptcy have been of statutory origin, there have been evolved general rules to which brief reference may be profitably made before turning to the act of 1898 for the purpose of its detailed exposition.

**The Old Law.**—A bankrupt, by the old law, is defined to be a trader, who secretes himself, or does certain other acts tending to defraud

his creditors, or demonstrating, at least, an inability to pay his debts. The relief afforded and penalties denounced, applied to traders; and to this class alone were proceedings in bankruptcy available in England at the date of the adoption of the Constitution of the United States,—the law holding it to be at that time an unjustifiable practice for any person other than a trader to encumber himself with debts to any considerable amount.

Creditors enjoyed the right of forcing the remedy upon the debtor, to whom no privilege was given of originating the procedure, in England, until 1842, when for the first time it arose by statute whereby the debtor was permitted to become a voluntary bankrupt.

Guided in our jurisprudence, at the adoption of the Constitution in 1789, by the law of England, it has been contended that the power conferred upon Congress to establish uniform laws on this subject was limited to an exercise of the power which gave relief to traders only, this being the class in England then alone embraced within the bankruptcy laws. The Supreme Court of the United States declined to so decide, and it is now well settled that such laws may embrace all classes of debtors, and grant them the privileges of voluntary, or inflict the coercion of involuntary, bankruptcy.

The restriction to persons in trade continued in the law of 1841, since therein the distinction was maintained by confining its provisions to "all persons being merchants, or using the trade of merchandise, all retailers of merchandise, and all bankers, factors, brokers, underwriters, or marine insurers, owing debts," these being dependent largely upon their credit for the conduct of their affairs; whereas professional men, farmers and other laborers, need not incur indebtedness and risk in the prosecution of their business.

**The Modern Law.**— A bankrupt, within the modern law, may be any debtor resident within the United States—and by the law of 1898 (§ 55a) any foreign debtor—who, owing the amount and following the forms prescribed, will or may be compelled to surrender to his creditors all his property except that exempt from execution. The old notion that traders only should suffer the penalties and enjoy the relief afforded by the bankruptcy law has been discarded for this more liberal doctrine.

**Congress Has Supreme Jurisdiction.**— The Constitution of the United States empowers Congress "to establish uniform laws on the



subject of bankruptcies." This gives jurisdiction over the entire subject, and does not confine Congress to the re-enactment of the laws in force in England in 1789, when the Constitution of the United States was adopted, but confers full control, with authority to devise from time to time systems best suited to the needs of the country.<sup>1</sup>

Within the limit of uniformity, Congress is independent of restraint, and may act freely, enjoying the power to prescribe terms upon which the insolvent may secure his release from the unpaid balance of his indebtedness.

The modern practice in bankruptcies may be comprised within the terms — Distribution of the assets and discharge of the person of the insolvent debtor; both being peculiarly within the legislative discretion of Congress under the Constitution.

The law must be uniform throughout the United States, and must prescribe the same rule in all the districts of the United States, subject to a liberal construction of the term.

**Bankruptcy Law Must be Uniform.**— The only restriction imposed upon Congress by the Constitution being that the law passed on the subject of bankruptcies shall be uniform, the system may provide for voluntary or involuntary bankruptcy, and apply to traders only or to all persons, to corporations as well as natural persons; fix the amount of the debtor's liability to which it will give relief, or leave the amount unlimited; designate the courts to which its execution will be committed; prescribe the means of administering it, and the modes of procedure, and define the property of the debtor which shall be exempt from the demands of the creditor; avoid assignments

<sup>1</sup> See constitutional provision, art. I. § 8 (4). mitted voluntary bankruptcy to all persons; and so it is construed now.

Discretion of Congress to prescribe the manner of distributing the assets and discharge of the person of the insolvent debtor. In re Silverman, 4 B. R. 173; id. 13 I. R. R. 52; id. 2 Abb. (U. S.) 243; In re Reynolds, 8 R. I. 485. Sturgis v. Crowninshield, 4 Wheat. 122; s. c. 2 Kent, 390; s. c. 2 Story Const. 1111. For the law of 1800 and its repeal, see 1 Story Laws of U. S. 732; 2 Story Laws of U. S. 909; 1 Statem. Man. 135, 242.

In 1789, when the United States Constitution was adopted — including this bankruptcy clause — traders alone could become bankrupts, and they not voluntary. Yet this clause has since the first act of 1800 per- For the law of 1841 and its repeal, see 5 Story Laws of U. S. 2829, 2978; 2 Statem. Man. 1407, 1422. For the law of 1867, see Rev. Stat. U. S. 969, § 4972; 14 U. S. Stat. 517.

under state laws, and legislate upon any right necessarily incident to the subject.<sup>1</sup>

) The only restriction is that the law must be uniform throughout the United States. So that if the law prescribes one rule for one district and a different rule for other districts, such a law is not uniform.<sup>2</sup>

| Some difficulty has arisen in construing the provision usually found in Bankruptcy Laws exempting from its operation all property not subject to forced sale under the state laws. These exemptions are not the same in every state; and by the adoption of this mode of providing for the family of the insolvent it is seen a lack of uniformity is introduced in the federal law.<sup>3</sup>

| Such provisions, however, are held not to conflict with the constitutional power vested in Congress to establish only uniform laws upon the subject of bankruptcies.<sup>4</sup>

1 Implications are favored extending the power of Congress over bankruptcy. *Russell v. Cheatham*, 16 Miss. 703.

May be voluntary or involuntary. *Kunsler v. Kohaus*, 5 Hill (N. Y.) 317; *Lalor v. Wattles*, 8 Ill. 255; *Morse v. Hovey*, 1 Sandf. Ch. (N. Y.) 187; *Thompson v. Alger*, 53 Mass. 482; *State Bank v. Wilborn*, 6 Ark. 35; *Keene v. Mould*, 16 Ohio, 12; *Rowan v. Holcomb*, 16 Ohio, 463; *Hastings v. Fowler*, 2 Ind. 216; *Reed v. Vaughan*, 15 Mo. 137.

Procedure prescribed by Congress. *Goodal v. Tuttle*, 3 Biss. (C. C.) 219; *Mitchell v. Mfg. Co.*, 2 Story (C. C.) 648.

May fix property to be exempt. In *re Reiman and Friedlander*, 11 B. R. 21; *id.* 13 B. R. 128; *id.* 7 Ben. (D. C.) 445; *id.* 12 Blatch. (C. C.) 562.

May avoid an assignment. In *re Brenneman, Crabbe* (U. S.), 456.

2 The law must be uniform, and not provide different rules for different districts. *Kittridge v. Warren*, 14 N. H. 509; *Morse v. Hovey*, 1 Sandf. (N. Y.) 187.

3 Yet exemptions made as provided by state law are uniform, though different in every state. In *re Appold*, 6 Phila. 469; In *re Smith*, 2 Woods, 458; s. c. 14 B. R. 295; s. c. 2 N. Y. Week. Dig. 532.

4 And such exemptions according to state law are valid. In *re Becker-korb*, 1 Dill. 45; s. c. 10 Am. L. Reg. 57; In *re Jordan*, 8 B. R. 180.

And this, too, without regard to time debt was contracted. In *re Jordan*, 10 B. R. 427.

Even though such exemption had been held invalid by state courts. In *re Smith*, 2 Woods, 458; s. c. 14 B. R. 295.

But the law will be so construed as to give it uniform operation if possible. *A. & C. R. R. Co. v. Jones*, 5 B. R. 97.

The declaratory act of 1873 unconstitutional as to exemptions, because not uniform. In *re Deckert*, 10 B. R. 1; s. c. 3 Am. L. R. 96; s. c. 1 Cent. L. J. 116, 320. Compare In *re Shipman*, 11 B. R. 579. See also 8 B. R. 1; In *re Dillard*, 9 B. R. 8. Also 6 Am. L. T. 490.

This view of the exemption clause will be hereinafter more fully treated under its proper analytical subdivision.

**Insolvent Laws Suspended by Bankruptcy Act.**—The federal bankruptcy acts operate to suspend the state insolvent laws in force at the passage of the former, so far as they concern new actions thereunder relating to the same subject-matter and the same persons treated of by such bankruptcy statute.<sup>1</sup>

Laws originating from different sources relating to the same subject-matter, the same persons and the same conditions, to be administered by independent tribunals, must often conflict; to avoid such conflict the federal bankruptcy statutes suspend the state insolvent laws as to all cases begun after their taking effect.

Cases to which the jurisdiction of the state courts has attached are not affected, and the state court may continue to apply the state Insolvent Law thereto, and proceed to final administration of the insolvent's estate. This jurisdiction attaches from the moment the state court has made any order assuming to control the *corpus* of the property of the insolvent or protect it from his creditors.<sup>2</sup> A suit begun, wherein no order has been taken extending the jurisdiction of the court over the property itself, will be suspended by the federal act.<sup>3</sup>

As will be hereafter seen, the same rule has heretofore obtained with reference to insolvent corporations whose estates are subject to administration under the state law. The state law is suspended *ipso facto* as to the estate of the corporation under the law of 1867, though its charter may still have been forfeited by the courts of the state

<sup>1</sup> The Bankruptcy Law suspends R. 126; *id.* 19 La. An. 497; Bank—the state Insolvent Law. *Thornhill v. Bank of La.*, 3 B. R. 110; *id.* 5 B. R. 367; *Commonwealth v. O'Hara*, B. R. Sup. 19; *id.* 6 A. L. Reg. 765; *Perry v. Longley*, 1 B. R. 155; *id.* 1 L. T. B. 34; *id.* 7 A. L. Reg. 429; *Van Nostrand v. Carr*, 2 B. R. 154; *id.* 30 Md. 128; *id.* 1 B. L. T. 154; *Martin v. Berry*, 211.

<sup>2</sup> Jurisdiction of state court attaches when order is made. *Martin v. Berry*, 2 B. R. 188; *id.* 37 Cal. 208; *Meekins v. Creditors*, 3 B. R. 126; *id.* 19 La. An. 497; *In re Holmes*, 1 N. Y. Leg. Obs. 3 But not till then. *Fish v. Montgomery*, 21 La. An. 447.

under *quo warranto* or other appropriate remedy; this having no relation to the proceeding in bankruptcy.<sup>1</sup>

So, likewise, the state law may be invoked in those commonwealths permitting imprisonment for debt to release the person of the debtor, notwithstanding the federal jurisdiction has assumed control of his estate.<sup>2</sup>

On the other hand, the bankruptcy act will not suspend proceedings to punish the fraud of the insolvent debtor; nor the right of the insolvent to be discharged under the poor debtor acts in those states where such laws prevail; nor laws prescribing merely the mode of administering estates assigned by debtors as at common law, subject to be enforced, like other trusts, by a court of equity; nor state laws affecting debts created by fraud, and other debts not released by discharge in bankruptcy; nor to indebtedness too small to permit bankruptcy proceedings, as if less than \$300, under the law of 1867.<sup>3</sup>

<sup>1</sup> State laws as to insolvent corporation suspended, but not laws to forfeit charter. *Thornhill v. Louisiana*, 3 B. R. 110; *id.* 5 B. R. 367; *In re Merchants Insurance Co.*, 6 B. R. 43; *id.* 4 C. L. N. 73.

The assets of insolvent corporation must be administered by federal Bankruptcy Court, though the state court retain control of the corporate franchises. *Platt v. Archer*, 6 B. R. 465; *id.* 9 Blatch. 559.

<sup>2</sup> In like manner the state law may discharge a natural person from imprisonment for debt, pending the bankruptcy. *Shears v. Solhinger*, 10 Abb. Pr. (N. Y.) 287; *In re Reynolds*, 8 R. I. 485.

<sup>3</sup> Fraud of insolvent may be punished under state law. *Stockwell v. Silloway*, 100 Mass. 287.

And debtor may claim benefit of the poor debtor's act. *Stockwell v. Silloway*, 100 Mass. 287; *Jordan v. Aldrich*, 1 A. L. J. 240.

And release under common-law assignments. *In re Hawkins*, 2 B. R.

122; *id.* 8 A. L. Reg. 205; *id.* 34 Conn. 548; *Beck v. Parker*, 18 Pitts. L. J. 14; *id.* 65 Penn. 262; *Maltbie v. Hotchkiss*, 5 B. R. 485; *id.* 38 Conn. 80.

State law not suspended as to debts created by fraud, and other debts not released by discharge. *In re Winternitz*, 4 B. R. 127; *id.* 18 Pitts. L. J. 61.

The state law is suspended as between citizens of same state. *Cassard v. Kroner*, 4 B. R. 185; *id.* 2 B. L. T. 308.

And as to attachments authorizing involuntary bankruptcy. *Tobin v. Trump*, 3 Brewst. 288.

But not in case of indebtedness less than \$300 under the act of 1867. *Shepardson's Appeal*, 36 Conn. 23.

Nor to settlements by consent under the state laws. Yet if the issue is raised the state court must yield. *Maltbie v. Hotchkiss*, 5 B. R. 485; *id.* 38 Conn. 80; *Reed v. Taylor*, 32 Iowa. 209.

**Voluntary and Involuntary Bankruptcy.**—Bankruptcy may be voluntary or involuntary; voluntary, when the debtor, acting for himself, files his petition in bankruptcy; and involuntary, when the debtor, having committed certain acts indicating an inability or unwillingness to pay his debts, is forced by one or more of his creditors to surrender his property through proceedings begun by such creditor or creditors filing such petition, with or without his consent.

In England until 1842 voluntary bankruptcy was not permitted, the laws having been framed prior thereto for the benefit of the creditor primarily, and only secondarily granting that relief to the debtor which, incidentally, removed his financial embarrassment by methods best adapted to the distribution of his estate in the interest of his creditors, having little or no consideration for the debtor's future status.

**Bankruptcy and Insolvent Laws.**—Bankruptcy and insolvent laws relate to similar conditions of creditor and debtor; the one demanding payment of obligations incurred by the other; such other being unable to satisfy the demands.

The present policy of bankruptcy laws is: First, to benefit the creditor by securing means to constrain the failing debtor to suffer liquidation, and to punish fraudulent debtors; second, to benefit the public by releasing useful and honest men embarrassed, according to the earlier doctrine by enterprises necessarily perilous, but according to the later doctrine by any character of enterprise or misfortune; and, third, incidentally, to benefit the debtor himself by relieving him from the diligence of creditors, that he may begin anew his business career.<sup>1</sup>

Insolvent laws, on the contrary, were designed to relieve the debtor from the rigors of imprisonment for debt upon his surrendering all his property to the individual creditor at whose complaint he suffers; but no discharge from any other debt, nor even from the debt then being pressed, followed such surrender, further than the assets so applied may have passed a credit to, or have satisfied, this particular demand.<sup>2</sup>

<sup>1</sup> The three purposes of the Bankruptcy Law; to benefit, first the creditor; second the public, and third the debtor. 2 Bl. 472.

<sup>2</sup> Policy of insolvent laws. 2 Kent. 390; 2 Story Const., § 1111; Sturgis v. Crowninshield, 4 Wheat. 122; Shears v. Solinger, 10 Abb. Pr. (N. Y.) 287.

By the early English law, imprisonment continued until the debt was paid, unless the creditor, relenting, discharged the debtor, whereupon the law discharged the debt.<sup>1</sup>

This rigor has been relaxed in England by succeeding statutes, until the "Lords act" permitted debtors, in execution, for amounts of £100 or less, to discharge the debt by surrendering all their property, except wearing apparel, implements of trade and the like, not to exceed in value £10; and in 1861 the benefit of the Bankruptcy Law was extended to all insolvent debtors.<sup>2</sup>

**States May Pass Insolvent Laws.**—Notwithstanding the effect of the federal Bankruptcy Law is to suspend the state Insolvent Law when in conflict therewith, no restriction is placed upon the states, and they may pass insolvent, or even bankruptcy, laws, giving full effect to their legislative discretion, limited only by the provisions of the federal Constitution granting to Congress the power to establish uniform laws on the subject of bankruptcies and denying to the states power to impair the obligations of contracts.<sup>3</sup>

<sup>1</sup>Imprisonment indefinite, at will leaving power with the states to of creditor. 3 Bl. 415, and note 6; pass bankruptcy and insolvent laws Bac. Abr. Execution C. 3; "Lords when not exercised. *Sturgis v. Act*," 32 Geo. 11, chap. 28, 1759; 3 *Crowninshield*, 4 *Wheat*, 122, 196. Bl. 416. *Contra*, *Golden v. Prince*, 3 *Wash*.

See for similar modification of the 313; *McLean v. Bank of Lafayette*, early law of imprisonment for debt, 3 *McLean*, 185; *Chandler v. Siddle*, 10 Stat. 53 *Geo*. 111, chap. 102; *Stats*. B. R. 236.

<sup>2</sup>1 and 2 *Victoria*, chap. 110.

<sup>3</sup>All insolvents in England allowed benefit of the Bankruptcy Law in 1861. 3 Bl. 416, and note 7; 2 Bl. 484; 2 *Steph. Com*. 214; *Williams Personal Property*, 149; *Stats*. 24 and 25; *Victoria*, 1861.

<sup>3</sup>The state law is suspended if in conflict with the federal bankruptcy act, and is void if retroactive in its effect. 2 *Kent*, 389; 2 *Story Const*. 1195; *Ogden v. Saunders*, 12 *Wheat*, 213, 369; *Bayle v. Zacharie*, 6 *Pitt*, 348.

The grant to Congress is not exclusive, denying power to the states, but is superior only when exercised.

Nor did the law of 1800, excepting state laws in force, validate the unconstitutional laws impairing obligations of contracts. *Sturgis v. Crowninshield*, 4 *Wheat*, 122.

While federal Bankruptcy Law in force, debtor cannot be discharged under state law. *Boese v. King*, 2 *Sup. Ct. Rep*. 765, 769.

And federal court can enjoin state court from proceeding. *Ex parte Eames*, 2 *Story*, 322; *Id*, 1 *N. Y. Leg. Obs*, 212.

Unless state jurisdiction has already attached. *In re Holmes*, 1 *N. Y. Leg. Obs*, 211.

It follows that in all things the states may legislate relative to future insolvencies, whereby contracts then existing may not be impaired; provided, such legislation will be suspended if in conflict with any act of Congress, then existing or afterward passed, establishing a uniform system of bankruptcies.

**Who May be Bankrupts.**—The law of 1867 applied to all resident debtors, including traders, those not so engaged, corporations, resident aliens, *femes sole*, *femes covert*, and minors. Partners and private corporations engaged in pursuit of gain were subject to or could enjoy the protection of that law.<sup>1</sup> Municipal, literary and charitable corporations were not included. To become a voluntary bankrupt, the law of 1867 prescribed \$300 as the minimum of provable indebtedness. Debtors owing less could not become voluntary bankrupts. Although requiring a domicile in the United States, temporary non-residence did not deprive the debtor of its benefits or its application. The debtor must have been unable to pay his debts; and by this is meant legal insolvency. Corporations could act only through officers authorized by vote of a majority of corporators at a legal meeting called for the express purpose of considering the question of going into bankruptcy; and by corporators was meant stockholders.<sup>2</sup> A subsequent ratification was not sufficient.<sup>3</sup> The directors or trustees had no right to give such authority unless they were also the corporators. Some authorities hold the contrary, but there can be no question of the correctness of the rule above stated.

The debtor must have filed his petition in the District Court of that district in which he had resided six months, or in which he had carried

<sup>1</sup> All classes of debtors included in *Smith v. Teutonia Ins. Co.*, 4 C. L. the Bankruptcy Law. Act March 2, N. 130. Contrast Law 1898, § 55a. 1867; *James B. L.* 24; Rev. Stat. U. Temporary nonresidence. *Good-S.* 977, § 5023. fellow's case, 3 B. R. 114.

*Aliens.* *Goodfellow's case*, 3 B. Legal insolvency. *Hardy v. Clark*, R. 114; *id.* L. T. B. 69; *id.* *Lowell*, 3 B. R. 99. 510.

*Femes covert.* *O'Brien's case*, B. R. Corporators, not directors of a cor-  
Sup. 38. Minors. *Book's case*, 3 Mc- poration, must authorize the officers  
to file petition in bankruptcy.  
*Lean*, 317; *Derby's case*, 6 A. L. J. *Glaser's case*, 1 B. R. 73. 422.

<sup>2</sup> Corporations. *Sweatt v. Ry.*, 5 cent. *Lady Bryan Mining Co. case*, B. R. 224; *Adams v. Ry.*, 4 B. R. 99; 4 B. R. 36, 131.  
*Mercantile Ins. Co. case*, 6 B. R. 43;

<sup>3</sup> Subsequent ratification not suffi-

on business during that time, next preceding his application, or in which he had resided or carried on business for the longest period during that time; so that if he had resided in one district and carried on business in another, his petition may have been filed in either. By residence, it has been held, is meant domicile; and if this be correct it must be determined by the definition of that term as found in the state law.<sup>1</sup> On the contrary, it has been held that his residence, in the meaning of the bankruptcy act, was his place of abode, irrespective of his domicile. This holding is the better doctrine, and is conducive to an uniform<sup>2</sup> construction of that most commendable provision of the Constitution authorizing uniform laws on the subject of bankruptcy.

By the expression "carried on business" is implied a defined business carried on by the debtor. The vocation of a minister, a clerk, an operative, a superintendent for another, not using his own capital, or capital borrowed in his own name,—none of these carry on business in the sense used in the bankruptcy act. These could not apply in the districts where employed, but must have applied in the district of the longest residence during the preceding six months. One carrying on a defined business may be engaged in other matters in another district, but these collateral engagements do not confer jurisdiction on the ground that the debtor was carrying on business in such other district.<sup>3</sup>

If the debtor had resided or carried on business in several districts during the preceding six months, the proper district in which to make application was the one in which he so resided or carried on business for the longest period during the next preceding six months,—though this may not have been the period immediately next preceding the date of the application. Nor is any period too short, if no longer period has been passed in another district; as where a residence within

<sup>1</sup> Residence is held in some instances to mean domicile. Good- Magie's case, 1 B. R. 138. Contra fellow's case, 3 B. R. 114; Walker's case, 1 B. R. 90. Good- holding, Balley's case, 1 B. R. 177; Belcher's case, 1 B. R. 202.

<sup>2</sup> By the better rule, residence means actual abode, not domicile. Collateral engagements in another district do not confer jurisdiction to apply in such district. Alabama Watson's case, 4 B. R. 197. R. R. case, 6 B. R. 107.

<sup>3</sup> What is meant by "carried on business." Little's case, 2 B. R. 97;



the United States has been enjoyed for but a single day before application, no residence in another district having been longer.<sup>1</sup>

Unless the court to which application was made had jurisdiction, the proceedings were void, and subject to discontinuance at the prayer of a creditor, or the application for discharge might be prevented, or, if made, defeated, or, if granted, its effect annulled, by plea to the jurisdiction of the court in which such discharge was given.<sup>2</sup>

**Who May be Bankrupts under the Law of 1898.**— Any person who owes debts, except a corporation, may be a voluntary bankrupt.

Certain classes of debtors are relieved from involuntary bankruptcy: (1) A wage-earner at a compensation of not exceeding \$1,500 per annum; (2) a person engaged chiefly in farming or the tillage of the soil; (3) all corporations, save those engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits; and (4) debtors owing less than \$1,000.

The above five classes of corporations may be forced into involuntary bankruptcy, but cannot become voluntary bankrupts. No other classes of corporations can be either voluntary or involuntary bankrupts.

Private — but neither state nor national — banks may be adjudged involuntary bankrupts.<sup>3</sup>

**Husband and Wife under Law of 1867.**— A *feme covert* may become a voluntary bankrupt, but may plead coverture to the debt upon which it is attempted to proceed against her by way of forcing involuntary bankruptcy upon her; and by such plea she may defeat the proceeding, unless it appears that she had contracted a debt binding upon her separate estate, or otherwise chargeable against her; and so a firm of which a married woman is a member may be forced into involuntary bankruptcy.<sup>4</sup>

<sup>1</sup> Longest period. *Foster's case*, 3 B. R. 57. May plead coverture to the debt if not binding upon her, and defeat involuntary bankruptcy.

One day may have been the longest period. *Goodfellow's case*, 3 B. R. 114. *Schlichter's case*, 3 B. R. 107; *Howland's case*, 2 B. R. 114.

<sup>2</sup> Jurisdiction necessary to a valid discharge. *Walker's case*, 1 B. R. 90; *Goodfellow's case*, 3 B. R. 114. But if the debt is binding on her or her separate estate she cannot thus defeat the proceeding. *Schlichter's case*, 3 B. R. 107; *Howland's case*, 2 B. R. 114.

<sup>3</sup> Act of 1898, chap. 3, § 4.

<sup>4</sup> *Feme covert* may become a voluntary bankrupt. *O'Brien's case*, B. R. Sup. 38. A member of firm, she may be declared a bankrupt. *Kinthead's case*, 7 B. R. 439; *O'Brien's case*, B. R. Sup. 38.

In those states where she may own property and carry on business in her own name, the bankruptcy of the husband cannot affect her, and she may employ him in the conduct of her business.<sup>1</sup>

At common law, her earnings and all her personal property become his at the marriage, or as soon as acquired.<sup>2</sup>

Property acquired and paid for by him, if at the time he was solvent and so intended, would become the property of the wife, and might be retained by her upon his bankruptcy; and such a purchase by her in his name, without agreement as to reconveyance, has been held conclusive evidence of a gift to him which passed to his creditors upon his becoming bankrupt. If, however, money is deposited with the husband by the wife, as a loan and not as a gift, she will be protected as a creditor; nor can gifts from the husband to the wife be offset against the debt.<sup>3</sup>

**Insolvency and Bankruptcy Contrasted.**—Insolvency of the debtor generally means that he has not sufficient assets to satisfy his liabilities.<sup>4</sup> As applied to merchants the term means an inability to pay debts as they mature.<sup>5</sup> No definition has been given by statute, until the law of 1898,<sup>6</sup> and the distinction above noted may be applied to the several classes of debtors.

<sup>1</sup> May employ her husband, and <sup>3</sup> Money loaned by the wife to not subject her property to his debts the husband, a debt. *Bigelow's* in states where she is allowed to case, 2 B. R. 170.

do business in her own name. *El-* <sup>4</sup> Insolvency, what is? *Toof v. dred's case*, 3 B. R. 61; *Driggs v. Martin*, 6 B. R. 49; *id.* 13 Wall. 40. *Russell*, 3 B. R. 39.

<sup>5</sup> Merchants, when insolvent?

The rule is, however, that the pro- *Sawyer v. Turpin*, 5 B. R. 339; *Will-* ceeds of the labor of husband or *lams' case*, 3 B. R. 74; *Merchants'* wife are subject to his debts. *Nat'l. Bk. v. Truax*, 1 B. R. 146; though the proceeds of necessary *Gay's case*, 2 B. R. 114; *Wright's* labor bestowed on her separate es- *case*, 2 B. R. 155; *Wadsworth v. Ty-* tate are not. *Shackelford v. Collier*, *ler*, 2 B. R. 101; *Graham v. Stark*, 6 Bush, 149. *3 B. R. 92; Scammon v. Cole*, 3 B.

<sup>2</sup> At common law, a wife's earn- *R. 100; Rison v. Knapp*, 4 B. R. 114; ings belong to her husband, and *Forsyth's case*, 7 B. R. 174; *Hardy* her payment of the purchase price *v. Clark*, 3 B. R. 99.

of property out of her separate es- <sup>6</sup> See *post*, Act of 1898, index In- tate has been held a gift to him; solvency.

and a purchase by the husband in *Danger of insolvency only will not* a wife's name a gift to her. *Keat-* avoid a transfer. *Beals v. Quinn*, *ing v. Keefer*, 5 B. R. 133. 101 Mass. 262.

Those engaged in commercial pursuits are practically insolvent when they fail to meet their debts as they mature in the ordinary course of business; whereas debtors not so engaged are not held in business to so strict an accountability, and may be solvent although their obligations have long since matured; provided their assets are sufficient to discharge their liabilities.

The state of insolvency is one of fact, and not to be clearly defined.<sup>1</sup> What is insolvency in one locality may not be such elsewhere. It is evident the strict rule of the exchanges in large cities should not be applied to the farmer in the country; and between these extremes are many modifications of the two views above presented.

The rule applied to merchants in the larger cities would not fairly guide to just conclusions when the financial standing of the country merchant is under consideration.<sup>2</sup>

Insolvency alone would not subject the debtor to the pains of involuntary bankruptcy,—nor are the terms insolvency and bankruptcy synonymous. Insolvency means an inability to pay debts. Bankruptcy means that this inability, coupled with the procedure ending in a decree discharging his liabilities, has created a legal status wherein he stands free of debt.<sup>3</sup> This procedure, under the act of 1867, may

<sup>1</sup> Insolvency to be decided by the facts of each case. *Miller v. Keys*, 3 B. R. 54; *Driggs v. Moore*, 3 B. R. 149; *Hall v. Wager*, 5 B. R. 181; *Potter v. Coggeshall*, 4 B. R. 19; *Vanderhood v. Bank*, 5 B. R. 270; *Darley v. Lucas*, 5 B. R. 437; *Markson v. Hobson*, 4 O. L. N. 75.

<sup>2</sup> The question is one for the jury. *Pierce v. Evans*, 61 Penn. 415.

<sup>3</sup> Insolvency and bankruptcy distinguished. *Black's case*, 1 B. R. 81; *Craft's case*, 2 B. R. 44; *Morgan v. Mastick*, 2 B. R. 163. A single note protested does not render a merchant insolvent. *Hardy v. Benninger*, 4 B. R. 77.

An inability to pay one debt in due course of business is sufficient to render a merchant insolvent. *Diblee's case*, 2 B. R. 185; *Driggs v. Moore*, 3 B. R. 149.

If the debts due cannot be paid,

or made by execution, as they become due, the debtor is insolvent. *Wells' case*, 3 B. R. 95; *Randall's case*, 3 B. R. 4.

In this condition the debtor cannot prefer a creditor. *Curran v. Munger*, 6 B. R. 33.

And his acts may justify presumption that he contemplates insolvency. *Walte's case*, 1 B. R. 84.

Acts of bankruptcy must have been alleged and proved by the creditor seeking to force his debtor into involuntary bankruptcy. *Craft's case*, 1 B. R. 89; *Haughton's case*, 1 B. R. 121.

A warrant of attorney to confess judgment raises no presumption of insolvency. *Diblee's case*, 2 B. R. 185.

Nor that railway bonds have only a nominal value. *Tucker v. Opelousas R. R.*, 3 B. R. 31.

have taken the form of a voluntary application by the debtor, or that of an application by a creditor or creditors. In the latter case, acts of bankruptcy must have been alleged and proved, in addition to the state of insolvency, on the part of the debtor. But it is immaterial whether the debtor knew or did not know of his condition.<sup>1</sup> If insolvent, the law presumes he knew the fact, though it does not follow he will be charged with knowledge of the legal definition of the term insolvency.<sup>2</sup> Yet the debtor must have done the act of bankruptcy charged with the intent prescribed by law, and at the time he must have been insolvent or in contemplation of insolvency. These acts, intents and financial conditions must concur to subject the debtor to involuntary bankruptcy.<sup>3</sup>

**Involuntary Bankruptcy; Prerequisites.**—Any debtor permitted by law to become a voluntary bankrupt may have been subjected, under the law of 1867, to involuntary bankruptcy by creditors having the qualifications hereafter to be noted.<sup>4</sup> The debtor, however, must have been guilty of some act of bankruptcy prescribed by the statute, and this must have been some act beyond the mere inability or refusal to pay debts, and the act alleged and complained of must have been one clearly defined and denounced by the law, when liberally construed as a highly remedial enactment.

By section 39 of the act of 1867,<sup>5</sup> no debtor could have been subjected to involuntary bankruptcy unless he had departed from the state, district or territory of which he was an inhabitant, with intent

<sup>1</sup> Debtor's knowledge of his insolvency are defined and declared void in section 35 of said act. *Farrin v. Crawford*, 2 B. R. 181.

<sup>2</sup> It will not be presumed the debtor knew the definition of the term insolvency. *Smith's case*, 3 B. R. 98. Compare these two sections in connection with *Nicodemus' case*, 3 B. R. 55, and *Muller's case*, 3 B. R. 86.

<sup>3</sup> Involuntary bankruptcy, the act, intent and financial condition must concur. *Craft's case*, 1 B. R. 89. <sup>5</sup> Section 39 of the act liberally construed according to fair import of the terms used. *Locke's case*, 2 B. R. 123; *Muller's case*, 3 B. R. 86; *Silverman's case*, 4 B. R. 173.

Actual insolvency not necessary, but contemplation thereof, sufficient. *Diblee's case*, 2 B. R. 185. And is intended to distribute the estate of the bankrupt impartially. *Diblee's case*, 2 B. R. 185; *Locke's case*, 2 B. R. 123; *White v. Roperty*, 3 B. R. 53.

<sup>4</sup> Acts of bankruptcy are defined in section 39, law of 1867. Preferences prohibited. § 35. Act of 1867. *Fraudulent preferences and con-*

to defraud his creditors, or, being absent, with such intent remained absent; or concealed himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under the act; or concealed or removed any of his property to avoid its being taken on legal process; or made an assignment, gift or transfer of his property, either within or without the United States, with intent to hinder, delay or defraud his creditors; or was arrested and held in custody for seven days, as provided in the act of 1867; or was actually imprisoned for more than seven days in a civil action founded on contract for the sum of \$100 or upwards; or, being bankrupt or insolvent, or in contemplation thereof, gave a preference to one or more creditors, or to any person or persons liable to him as indorsees, bail, sureties, or otherwise, with intent to defeat or delay the operation of the act, as therein provided; or being a banker, broker, merchant, trader, manufacturer or miner, fraudulently stopped and did not resume payment of his commercial paper within fourteen days.<sup>1</sup>

Within six months after the commission of any one or more of such acts by such debtor, his creditor or creditors, possessing the prerequisites hereinafter defined, could file his or their petition to subject him to involuntary bankruptcy.

Unless guilty of one or more of such acts, the debtor could defeat the application by his creditors seeking to force him into involuntary bankruptcy.

These clauses, defining what constituted acts of bankruptcy, are closely allied to those provisions of the law wherein are denounced preferences to creditors, or transfers of property by debtors then insolvent or contemplating insolvency.

Such preferences to creditors within four months, and such transfers to other persons within six months, before the filing of the petition by or against the debtor were void, if the person or creditor receiving the same had reasonable cause to believe the debtor insolvent or acting in contemplation of insolvency, and with intent to evade the Bankruptcy Law.

It does not follow that evidence sufficient to have entitled the creditor to his remedy, by way of forcing the insolvent debtor into involun-

<sup>1</sup> Acts of bankruptcy, § 39, Act to section 39. Tonkin's case, 4 B. R. of 1867. 13; Black's case, 1 B. R. 81; Wad-

Qualifications prescribed by sec- worth v. Tyler, 2 B. R. 101.  
tion 35, when not inconsistent, apply

tary bankruptcy, would have been sufficient to avoid preferences or transfers made by the debtor previous to the filing of the petition.<sup>1</sup>

To avoid the preference or transfer, the debtor must have been insolvent, the transfer must have been made with a view to give a preference, the transferee must have had reasonable cause to believe the debtor insolvent and that the transfer was in fraud of the bankruptcy act, and the preference or transfer must have been within the time, fixed by the act, previous to the filing of the petition by or against the debtor.

The creditor who attempted to secure his debt during the pendency of the law of 1867, did so at his peril, and was subject to attack by other creditors within four months thereafter, upon the ground that the debtor was insolvent, and known so to be to the creditor taking such security.<sup>2</sup>

<sup>1</sup> Sufficient evidence of act of bankruptcy may not be sufficient to avoid a conveyance charged to be fraudulent as a preference. Nicodemus' case, 3 B. R. 55; Fuller's case, 4 B. R. 20.

Though such conveyance is held evidence of fraud in *Perry v. Longley*, 1 B. R. 155; *Hawkins v. Dean* and *Hawkins v. Garrett*, 2 B. R. 20; *Davis v. Armstrong*, 3 B. R. 29.

For difference between the debtor's intent, denounced by Laws of 1841 and 1867, see *Arnold's case*, 2 B. R. 61; *Haughey v. Albin*, 2 B. R. 129; *Foster v. Hackley*, 2 B. R. 131; *Kingsbury's case*, 3 B. R. 84.

Valid transfers upheld. *Wynne's case*, 4 B. R. 5; *Potter v. Coggeshall*, 4 B. R. 19.

To be void, the preference or transfer must come within the express terms of the law. *Toof v. Martin*, 6 B. R. 49; *id.*, 13 Wall. 40; *Foster v. Hackley*, 2 B. R. 131; *Hunt's case*, 2 B. R. 166; *Street v. Dawson*, 4 B. R. 60; *Haughey v. Albin*, 2 B. R. 129; *Seammon v. Cole*, 4 B. R. 257; *Forbes v. Howe*, 102 Mass. 427.

<sup>2</sup> The burden was on the party attacking the preference to prove that the law had been violated. *Hunt's case*, 2 B. R. 166; *Beck's case* and *Hafer's case*, 1 B. R. 163.

The proceedings against the debtor by the creditor to force involuntary bankruptcy were independent of the proceedings against the preferred creditor. *Drummond's case*, 1 B. R. 10; *Diblee's case*, 2 B. R. 185; *Schick's case*, B. R. Sup. 38; *Dunkle's case*, 7 B. R. 72.

And did not affect the title transferred. *Williams' case*, 3 B. R. 74.

If the preference was made more than four months prior to the beginning of the proceedings under the bankruptcy act, whether for voluntary or involuntary bankruptcy, the other creditors cannot attack it for insolvency on part of the debtor and knowledge thereof on part of the creditor. *Bean v. Brookmire*, 4 B. R. 57.

But the preference will be held valid, whether the proceeding be voluntary or involuntary bank-

But if the four months in case of creditor, and six months in case of any other person, had transpired, the preference or transfer could not be questioned, if otherwise fair and honest.

This provision of the bankruptcy act in nowise prevented the avoidance of the conveyance creating the preference, on the ground of fraud.

**Courts of Bankruptcy, Act of 1867.**— Under the act of March 2, 1867, the District Courts of the United States were charged with the administration of the bankrupt's estate and empowered to order his final discharge, having original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, being authorized to hear and adjudicate upon these matters according to the provisions of that act. These courts were always open for the transaction of business, exercising the powers thereby granted and conferred in vacation as well as in term time, the judge sitting in chambers having the same power and jurisdiction — including the power of keeping order and punishing for contempt — as when sitting in court; the jurisdiction conferred being extended to all cases and controversies arising between the bankrupt and any creditor or creditors who claimed any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshaling and disposition of the different funds and assets so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters and things to be done under and by virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy. These courts had full authority to compel obedience to all orders and decrees passed by them in bankruptcy, and could sit for the transaction of business in bankruptcy at any place in the district, after due notice given at such place, as well as at the places designated by the law for holding such courts.

ruptcy. *Potter v. Coggeshall*, 4 B. R. 91; *Waurer v. Frantz*, 4 B. R. 19. 142; *Hubbard v. Allaire*, 7 Blatch.

See *Wynne's case*, 4 B. R. 5; *Ful-* 284; *Dow's case*, 4 B. R. 10; *Hall v. ler's case*, 4 B. R. 20; *Bean v. Brook-* Hayner. 3 C. L. N. 402; *Collins v. mire*, 4 B. R. 57; *Butler's case*, 4 B. Gray, 8 Blatch. 483.

The Supreme Court of the District of Columbia and of the territories, and the justices of the latter while holding District Court, exercised jurisdiction, under the law of 1867, over bankruptcies in their respective jurisdictions.

**Courts of Bankruptcy, Act of 1898.**—“Courts of Bankruptcy,” under chapter 2, section 2, of the law of 1898, include the District Courts of the United States in the several states and territories, the Supreme Court of the District of Columbia, and the United States Court of the District of Alaska and the Indian Territory.

Under chapter 4, section 23, of the act of 1898, the United States Circuit Courts have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees, as such, and adverse claimants, concerning the property claimed or acquired by the trustee, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted, and such controversies had been between the bankrupt and such adverse claimant; and have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act.

Under section 24, the Supreme Court of the United States, the Circuit Courts of Appeal of the United States, and the Supreme Courts of the Territories, in vacation and in chambers and during their respective terms, as now, or as they may be hereafter held, are invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy over which they have appellate jurisdiction in other cases. The Supreme Court of the United States exercises a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

**Definitions, Act of 1898.**—The act of 1898 seeks to avoid vexatious issues, such as arose under the act of 1867, by defining clearly many terms rendered necessarily technical by their use in bankruptcy legislation. This precaution will simplify the language of bankruptcy practice.

To illustrate: A distinction is drawn between the word “court” and the expression “courts of bankruptcy;” the former including the referee, the latter excluding him. A careful reading of the chap-



ter on definitions will reward the student and render the practitioner accurate in expression.<sup>1</sup>

**Referees.**—These officers are appointed by the courts of bankruptcy within the territorial limits of which these courts respectively have jurisdiction. Referees hold office two years, subject to removal by these courts in their discretion. The limits of the referee's district may be changed by these courts, provided there shall not be less than one referee in each county where the services of a referee are needed.<sup>2</sup>

**Trustees.**—These officers are appointed by the creditors of the bankrupt at their first meeting after the adjudication, or after a vacancy has occurred, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee. If the creditors do not appoint a trustee the court shall do so.<sup>3</sup>

**Creditors.**—The court shall cause the creditors to hold their first meeting not less than ten nor more than thirty days after the adjudication, or as soon thereafter as may be, at which the judge or referee shall preside, may allow or disallow claims there presented, and examine the bankrupt or cause him to be examined, appoint a trustee, or not more than three trustees, and take other steps which may be pertinent and necessary for the promotion of the best interests of the estate.<sup>4</sup>

**Estates.**—Depositories for money shall be designated by order of the courts of bankruptcy.<sup>5</sup> Actual and necessary expenses of officers must be reported in detail under oath, and be examined and approved or disapproved by the court, and, if approved, paid out of the estate in which they were incurred;<sup>6</sup> debts of the bankrupt of certain classes may be approved and allowed and priorities ordered;<sup>7</sup> dividends declared and paid;<sup>8</sup> liens adjudicated;<sup>9</sup> set-offs and counter-claims adjusted;<sup>10</sup> and the amounts due upon claims determined.

<sup>1</sup> Act of 1898, chap. 1, § 1.

<sup>2</sup> Act of 1898, chap. 5, § 34.

<sup>3</sup> Act of 1898, chap. 5, § 14.

<sup>4</sup> Act of 1898, chap. 6, § 55.

<sup>5</sup> Act of 1898, chap. 7, § 61.

<sup>6</sup> Act of 1898, chap. 7, § 62.

<sup>7</sup> Act of 1898, chap. 7, §§ 63, 64.

<sup>8</sup> Act of 1898, chap. 7, § 65.

<sup>9</sup> Act of 1898, chap. 7, § 67.

<sup>10</sup> Act of 1898, chap. 7, § 68.

**Possession of Property.**— The title and possession of property belonging to the bankrupt remains with him until after adjudication and the appointment and qualification of the trustee; provided, the judge may, upon satisfactory proof, by affidavit, that the bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected, or is neglecting, or is about to so neglect, his property so that it has thereby deteriorated, or is thereby deteriorating, or is about thereby to deteriorate, in value, issue a warrant to the marshal to seize and hold it subject to further orders. In this event the petitioner must first enter into bond in an amount to be fixed by the judge, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such assignee shall prove to have been wrongfully obtained. The bankrupt may file a bond and retain the property.<sup>1</sup>

**Title to Property.**— With exceptions unnecessary to mention at this time, the trustee, upon his qualification, takes title to the bankrupt's property as of the date of the adjudication. It shall be appraised by three appraisers appointed by the court.<sup>2</sup>

**When Act of 1898 Took Effect.**— This act took effect on July 1, 1898, having been on that day approved by the President; providing however, that no petition for voluntary bankruptcy shall be filed within one month, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.<sup>3</sup>

<sup>1</sup> Act of 1898, § 69.

<sup>3</sup> Act of 1898, last section.

<sup>2</sup> Act of 1898, § 70.

## TITLE I.

# THE LAW AND PRACTICE IN BANKRUPTCY.

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BANKRUPTCY ACT OF APRIL 4, 1800.

*An Act to establish an uniform System of Bankruptcy throughout the United States.*<sup>1</sup>

(Repealed by act of December 19, 1803, chap. 6.)

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of June next, if any merchant or other person residing within the United States, actually using the trade of merchandise, by buying and selling in gross, or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter, or marine insurer, shall, with intent unlawfully to delay or defraud his or her creditors, depart from the State in which such person usually resides, or remain

<sup>1</sup> **Decisions on the Bankruptcy** taches. When the negotiable paper **Law of the United States, 1800.**— was assigned after the commission The holder of a promissory note, of bankruptcy, the party takes it drawn before, but transferred after subject to any set-off as between the a commission of bankruptcy had is- drawer and payee. *Ibid.* sued against the drawer, is entitled Under the Bankruptcy Law of the to prove his debt under the commis- United States, a joint debt may be sion, and to receive a dividend. set off against the separate claim of *Humphreys v. Blight's Assignees*, 4 the assignee of one of the partners; *Dall.* 370. but such set-off could not have been

In the case of negotiable paper, made at law, independent of the the assignee takes it discharged of Bankruptcy Law. *Tucker v. Oxley*, all the equity as between the original 5 Cranch, 34; *Id.* 2 Cond. Rep. 182. parties, of which he had no notice. A joint debt may be proved under But wherever the assignee has no a separate commission, and a full tice of such equity, either positively dividend received; it is equity alone or constructively, he takes the as- which can restrain the joint creditor signment at his peril. A commis- from receiving his full dividend un- sion of bankruptcy is legal notice til the joint effects are exhausted. that wherever mutual debts sub- *Ibid.* sisted between the bankrupt and his Wherever the terms in which a creditors, the right of set-off at- power is granted by the Constitution

absent therefrom, or conceal him or herself therein, or keep his or her house, so that he or she cannot be taken, or served with process, or willingly or fraudulently procure him or herself to be arrested, or his or her lands, goods, money or chattels to be attached, sequestered or taken in execution, or make or cause to be made any fraudulent conveyance of his or her lands, or chattels, or make or admit any false or fraudulent security or evidence of debt, or being arrested for debt, or having surrendered him or herself in discharge of bail, shall

to Congress, or wherever the nature of the power itself requires that it shall be exclusively exercised by Congress, the subject is completely taken away from state legislatures, as if they had been forbidden to act upon it. The power granted to Congress of establishing uniform laws on the subject of bankruptcy is not of this description. *Sturgis v. Crowninshield*, 4 Wheat. 122; *id.* 4 Cond. Rep. 409.

In the distribution of a bankrupt's effects in this country, the United States are entitled to a preference, although the debt was contracted by a foreigner in a foreign country; and although the United States had proved their debt under the commission of bankruptcy, and had voted for an assignee. *Harrison v. Sterry et al.*, 5 Cranch. 289; *id.* 2 Cond. Rep. 260.

A conveyance on the eve of bankruptcy, to give a preference to a particular class of creditors, is a fraud on the Bankruptcy Law, and void. *Ibid.*

Such assignment may be valid to secure money actually advanced on the credit of it, and subsequent to its date. *Ibid.*

Under a separate commission of bankruptcy, against one partner only, his private property and his interest in the funds of the company passes. *Ibid.*

The right to compensation from Spain, held under an abandonment made to underwriters, and accepted by them for damages and injuries which were to be satisfied under the treaty by the United States, passed to the assignees of the bankrupt, who held such rights by the provisions of the Bankruptcy Law of the United States, passed April 4, 1800. *Comegys v. Vasse*, 1 Peters, 193.

The Circuit Courts of the United States have jurisdiction of matters arising under the Bankruptcy Law of the United States, as they have of any other subject, where the Constitution and laws of the United States give jurisdiction; but the District Courts have not the same jurisdiction in cases of bankruptcy as the chancellor of England has. *Lucas et al. v. Morris et al.*, 1 Paine's O. C. R. 396.

The Districts Courts of the United States have not, like the chancellor in England, exclusive jurisdiction over the entire execution of the Bankruptcy Law. They cannot remove assignees, nor compel them to account. *Ibid.*

Upon the death of an assignee, under the Bankruptcy Law of the United States, the right of action for a debt due to the bankrupt vested in the executor of the assignee. *Richards et al., Assignees, etc., v. Mary-*

remain in prison two months or more, or escape therefrom, or whose lands or effects being attached by process issuing out of, or returnable to, any court of common law, shall not, within two months after written notice thereof, enter special bail and dissolve the same, or in districts in which attachments are not dissolved by the entry of special bail, being arrested for debt after his or her lands and effects, or any part thereof, have been attached for a debt or debts amounting to one thousand dollars or upwards, shall not, upon notice of such

land Ins. Co., 8 Oranch, 84; *id.* 3 Cond. Rep. 45.

Where the original ground of action is founded on contract, but the immediate cause arises *ex delicto*, and the claim is for damages, unliquidated by any express agreement, or such as the law will not imply an agreement to pay, the certificate of bankruptcy is no bar; because such claim could not have been proved under the commission. *Dusar v. Murgatroyd*, 1 Wash. C. C. R. 13.

But if the agreement were to pay a particular sum, on failure to perform the contract; or if the case was such that the plaintiff has his election to bring either trespass or case for money had and received, and waives the former by bringing the latter; the damages become a debt, which the law implies a promise to pay, and the certificate is a bar. *Ibid.*

In an action brought against the owner of a vessel for damages for an injury sustained on board a ship by the neglect of the master, a certificate of bankruptcy cannot be pleaded in bar. *Ibid.*

One guilty of perjury in proceedings under the Bankruptcy Law, cannot be prosecuted for the offense after the repeal of the law. *United States v. Passmore*, 4 Dall. 372.

A deed executed before the 1st of June, 1800, although acknowledged

after, is not within the first section of the Bankruptcy Act of April 4, 1800, chapter 19. *Wood v. Owings*, 1 Cranch, 239; *id.* 1 Cond. Rep. 302.

A certificated bankrupt or insolvent, discharged from the particular contract, need not be made a party to the bill on the contract. *Van Reimsdyke v. Kane, Ex'r*, 1 Gall. C. C. R. 371.

The power given to Congress to pass uniform laws relative to bankruptcy is exclusive of such power in the state governments; and this, whether the former has thought proper to exercise it or not. *Golden v. Prince*, 3 Wash. C. C. R. 313.

A discharge from a debt under the bankruptcy laws of the place of contract is good in every other place where pleaded, as an extinguishment of the debt. But a like discharge where the contract is not made has no effect. *Le Roy v. Crowninshield*, 2 Mason's C. C. R. 151.

A debtor concealing himself from, and being denied to, his creditors does not constitute an act of bankruptcy under the laws of the United States, unless the service of process is thereby prevented. *Barnes et al. v. Billington*, 1 Wash. C. C. R. 29.

If the debtor order himself to be denied to creditors and others, and is in consequence thereof denied to an officer who comes to serve a process, it is an act of bankruptcy, pro-

attachment, give sufficient security for the payment of what may be recovered in the suit in which he or she shall be arrested, at or before the return-day of the same, to be approved by the judge of the district, or some judge of the court out of which the process issued upon which he is arrested, or to which the same shall be returnable, every such person shall be deemed and adjudged a bankrupt: Provided, that no person shall be liable to a commission of bankruptcy if the petition be not preferred, in manner hereinafter directed, within six months after the act of bankruptcy committed.

vided the officer comes to serve the debtor, to bring about an act of process and not on any other business, and the denial has taken place within six months of the issuing of the commission. *Ibid.*

Giving a bond, with warrant to confess judgment to one creditor upon the eve and in contemplation of bankruptcy, does not constitute a bankruptcy, unless the judgment entered on the bond and the issuing of the execution was at the instance or by the procurement of the debtor. Such a bond would be a fraud on the general creditors. *Ibid.*

Where two of three assignees of a bankrupt enter into an agreement in the absence of the third, the contract is not binding on the absent assignee, unless he had previously given authority to make it, or substantially recognize and acknowledge it. *Aliter*, among partners. *Blight v. Ashley et al.*, 1 Peters' C. C. R. 16.

The agreement of the assignees of a bankrupt to give a preference to a particular creditor is not valid without the assent of the commissioners and a certain portion of the creditors. *Ibid.*

Denial to an officer, whereby he is prevented serving process, must be really adversary, and not by concert between the creditor and the

No debt but such as is due and owing at the time of the bankruptcy can be proved under the commission; and, consequently, an indorser or acceptor of a bill of exchange, drawn by the bankrupt, who has not paid it before the bankruptcy, cannot prove the debt. *Marks et al., Assignees, v. Barker et al.*, 1 Wash. C. C. R. 178.

The acceptor or indorser of a bill of exchange, who pays the bill after the bankruptcy of the drawer, may offset the same against the bankrupt's assignees; but he must show the debt to be a subsisting one in him at the time the action was brought, for this is a case of mutual credit given before the bankruptcy, although the money was not paid until after. *Ibid.*

The District Courts of the United States have not power in bankruptcy cases to remove assignees, or compel them to account. *Lucas v. Morris*, Paine's C. C. R. 396.

The holder of the negotiable paper, payable "without defalcation" under the laws of Pennsylvania, assigned after a commission of bankruptcy has issued, may come in under the commission; allowing all just offsets existing at the time of

§ 2. And be it further enacted, That the judge of the district court of the United States, for the district where the debtor resides, or usually resided at the time of committing the act of bankruptcy, upon petition in writing against such person or persons being bankrupt, to him to be exhibited by any one creditor; or by a greater number, being partners, whose single debt shall amount to one thousand dollars, or by two creditors whose debts shall amount to one thousand, five hundred dollars, or by more than two creditors whose

the bankruptcy, and which would have been admitted if the assignment had not been made. *Humphreys v. Blight's Assignees*, 1 Wash. C. C. R. 44.

The purchaser of a negotiable note, who becomes so after a commission of bankruptcy has issued, may prove under the commission; and he holds the note subject to all legal offsets. *Ibid.*

The sixty-fifth section of the Bankruptcy Law of the United States, passed the 2d of March, 1790, does not repeal the provisions of the laws of the United States which give to the surety who pays bonds for duties a preference over the creditors. *Mott v. The Assignees of Maris*, 2 Wash. C. C. R. 196.

The provisions of the Bankruptcy Law except from its general operation, not only the preference of the United States, but also the right of preference for satisfaction of debts due to the United States. *Ibid.*

P. paid a sum of money to the United States, as surety of S., in a bond for duties. S. became insolvent, and assigned his effects to Baker, who received \$4,000 under the assignment, mixed the same with his own funds and afterward became bankrupt, and the defendants were appointed his assignees, but no effects known to be part of the estate of S.

came into their hands. The plaintiff claimed to have a preference and priority over the general creditors of Baker. By the Court.—Although the United States might, under the sixty-fifth section of the law to regulate the collection of duties, be entitled to claim of the defendants to the amount which came into the hands of B., as the assignee of S., the provisions of the law do not extend to the surety who has paid the bond the same rights and privileges. *Pollock v. Pratt & Harvey*, 2 Wash. C. C. R. 490.

A. H. devised an estate to C. S. for life; and after the death of C. S. he directed that the estate should be sold and divided among the grandchildren of the testator who should be living at the death of C. S. B. married one of the grandchildren, and after the death of C. S., B. became bankrupt. B. and wife, after the decease of C. S., sold the property claimed under the will of A. H., and the plaintiff claimed under this conveyance. By the Court.—The decisions of the English courts abundantly prove that a possibility, whether belonging to the husband or the wife, would not pass to the assignees of the husband, on his becoming bankrupt, if it were not for the strong language of the statutes of bankruptcy. *Krumbaar v. Burt*, 2 Wash. C. C. R. 406.

debts shall amount to two thousand dollars, shall have power, by commission under his hand and seal, to appoint such good and substantial persons, being citizens of the United States, and resident in such district, as such judge shall deem proper, not exceeding three, to be commissioners of the said bankrupt, and in case of vacancy or refusal to act, to appoint others from time to time as occasion may require: Provided always, that before any commission shall issue, the creditor or creditors petitioning shall make affidavit or solemn affirmation before the said judge of the truth of his, her or their debts, and give bond, to be taken by the said judge, in the name and for the benefit of the said party so charged as a bankrupt, and in such penalty, and with such surety, as he shall require, to be conditioned for the proving of his, her or their debts, as well before the commissioners as upon a trial at law, in case the due issuing forth of the said commission shall be contested, and also for proving the party a bankrupt, and to proceed on such commission in the manner herein prescribed. And if such debt shall not be really due, or after such commission taken out it cannot be proved that the party was a bankrupt, then the said judge shall upon the petition of the party aggrieved, in case there be occasion, deliver such bond to the said party, who may sue thereon, and recover such damages under the penalty of the same, as, upon trial at law, he shall make appear he has sustained, by reason of any breach of the condition thereof.

§ 3. And be it further enacted, That before the commissioners shall be capable of acting, they shall respectively take and subscribe the following oath or affirmation, which shall be administered by the judge issuing the commission, or by any of the judges of the Supreme Court of the United States, or any judge, justice or chancellor of any State court, and filed in the office of the clerk of the district court: "I, A. B., do swear, or affirm, that I will faithfully, impar-

The possibility held by B. under the will of A. H. formed no part of his estate to which he was entitled in law or equity, of which the commissions could take possession under the fifth section of the Bankruptcy Law of the United States; and, therefore, they could not transfer it to the assignees of the bankrupt, under the provisions of the sixth section. *Ibid.*

The provisions of the English Bankruptcy Laws, and those of the Bankruptcy Law of the United States, differ in relation to the contingent interests of the bankrupt;

and it is clear that by the most liberal construction of the law the interest of the husband in the estate of his wife, under the will of A. H., did not pass to the assignees. *Ibid.*

So exclusively have bankrupt laws operated on traders, that it may well be doubted whether an act of Congress subjecting to such a law every description of persons within the United States would comport with the spirit of the powers vested in them in relation thereto. *Per Livingston, J., in Adams v. Storey, Paine's C. C. R. 79.*



tially and honestly, according to the best of my skill and knowledge, execute the several powers and trusts reposed in me, as a commissioner, in a commission of bankruptcy against , and that without favor or affection, prejudice or malice." And the commissioners, who shall be sworn as aforesaid, shall proceed, as soon as may be, to execute the same; and upon due examination, and sufficient cause appearing against the party charged, shall and may declare him or her to be a bankrupt: Provided, that before such examination be had, reasonable notice thereof, in writing, shall be delivered to the person charged as a bankrupt; or if he or she be not found at his or her usual place of abode, to some person of the family above the age of twelve years, or if no such person appear, shall be fixed at the front or other public door of the house in which he or she usually resides, and thereupon it shall be in the power of such person, so charged as aforesaid, to demand before, or at the time appointed for such examination, that a jury be empanelled to inquire into the fact or facts alleged as the causes for issuing the commission, and on such demand being made the inquiry shall be had before the judge granting the commission, at such time as he may direct, and in that case such person shall not be declared bankrupt, unless, by the verdict of the jury, he or she shall be found to be within the description of this act, and shall be convicted of some one of the acts described in the first section of this act: Provided also, that any commission which shall be taken out as aforesaid, and which shall not be proceeded in as aforesaid, within thirty days thereafter, may be superseded by the said judge who shall have granted the same, upon the application of the party thereby charged as a bankrupt, or of any creditor of such person, unless the delay shall have been unavoidable, or upon a just occasion.

§ 4. And be it further enacted, That the commissioners so to be appointed shall have power forthwith, after they have declared such person a bankrupt, to cause to be apprehended, by warrant under their hands and seals, the body of such bankrupt, wheresoever to be found within the United States: Provided, they shall think that there is reason to apprehend that the said bankrupt intends to abscond or conceal him or herself, and in case it be necessary in order to take the body of said bankrupt, shall have power to cause the doors of the dwelling-house of such bankrupt to be broken, or the doors of any other house in which he or she shall be found.

§ 5. And be it further enacted, That it shall be the duty of the commissioners so to be appointed, forthwith, after they have declared such person a bankrupt, and they shall have power to take into their possession all the estate, real and personal, of every nature and description, to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever, and cause the same to be inventoried and appraised to the best value, (his or her necessary wearing apparel, and the necessary wearing apparel of the wife and

children, and necessary beds and bedding of such bankrupt only excepted) and also to take into their possession, and secure, all deeds and books of account, papers and writings belonging to such bankrupt; and shall cause the same to be safely kept, until assignees shall be chosen or appointed, in manner hereafter provided.

§ 6. And be it further enacted, That the said commissioners shall forthwith, after they have declared such person a bankrupt, cause due and sufficient public notice thereof to be given, and in such notice shall appoint some convenient time and place for the creditors to meet, in order to choose an assignee or assignees of the said bankrupt's estate and effects; at which meeting the said commissioners shall admit the creditors of such bankrupt to prove their debts; and where any creditor shall reside at a distance from the place of such meeting, shall allow the debt of such creditor to be proved by oath or affirmation, made before some competent authority, and duly certified, and shall permit any person duly authorized by letter of attorney from such creditor, due proof of the execution of such letter of attorney being first made, to vote in the choice of an assignee or assignees of such bankrupt's estate and effects in the place and stead of such creditor: and the said commissioners shall assign, transfer or deliver over, all and singular, the said bankrupt's estate and effects, aforesaid, with all muniments and evidences thereof, to such person or persons as the major part in value of such creditors, according to the several debts then proved, shall choose as aforesaid: Provided always, That in such choice, no vote shall be given by, or in behalf of, any creditor whose debt shall not amount to two hundred dollars.

§ 7. Provided always, and be it further enacted, That it shall be lawful for the said commissioners, as often as they shall see cause, for the better preserving and securing of the bankrupt's estate, before assignees shall be chosen as aforesaid, immediately to appoint one or more assignee or assignees of the estate and effects aforesaid, or any part thereof; which assignee or assignees aforesaid, or any of them, may be removed at the meeting of the creditors, so to be appointed as aforesaid, for the choice of assignees, is such creditors, entitled to vote as aforesaid, or the major part in value of them, shall think fit; and such assignee or assignees as shall be so removed, shall deliver up all the estate and effects of such bankrupt which shall have come to his or their hands or possession, unto such other assignee or assignees as shall be chosen by the creditors as aforesaid; and all such estate and effects shall be, to all intents and purposes, as effectually and legally vested in such new assignee or assignees as if the first assignment had been made to him or them by the said commissioners; and if such first assignee or assignees shall refuse or neglect, for the space of ten days next after notice, in writing, from such new assignee or assignees of their appointment, as aforesaid, to deliver over as aforesaid, all the estate and effects as aforesaid, every such assignee or assignees shall, respectively, forfeit a sum not exceeding five thou-

sand dollars, for the use of the creditors, and shall moreover be liable for the property so detained.

§ 8. And be it further enacted, That at any time previous to the closing of the accounts of the said assignee or assignees so chosen as aforesaid, it shall be lawful for such creditors of the bankrupt as are hereby authorized to vote in the choice of assignees, or the major part of them in value, at a regular meeting of the said creditors, to be called for that purpose by the said commissioners, or by one-fourth in value of such creditors, to remove all or any of the assignees chosen as aforesaid, and to choose one or more in his or their place and stead; and such assignee or assignees as shall be so removed shall deliver up all the estate and effects of such bankrupt which shall have come into his or their hands or possession, unto such new assignee or assignees as shall be chosen by the creditors at such meeting; and all such estate and effects shall be, to all intents and purposes, as effectually and legally vested in such new assignee or assignees as if the first assignment had been made to him or them by the said commissioners: and if such former assignee or assignees shall refuse or neglect, for the space of ten days next after notice, in writing, from such new assignee or assignees of their appointment, as aforesaid, to deliver over, as aforesaid, all the estate and effects aforesaid, every such former assignee or assignees shall respectively forfeit a sum not exceeding five thousand dollars, for the use of the creditors, and moreover shall be liable for the property so detained.

§ 9. And be it further enacted, That whenever a new assignee or assignees shall be chosen as aforesaid, no suit at law or in equity shall be thereby abated; but it shall and may be lawful for the court in which any suit may depend, upon the suggestion of the removal of a former assignee or assignees, and of the appointment of a new assignee or assignees, to allow the name of such new assignee or assignees, to be substituted in place of the name or names of the former assignee or assignees, and thereupon the suit shall be prosecuted in the name or names of the new assignee or assignees, in the same manner as if he or they had originally commenced the suit in his or their own names.

§ 10. And be it further enacted, That the assignment or assignments of the commissioners of the bankrupt's estate and effects as aforesaid, made as aforesaid, shall be good at law or in equity against the bankrupt, and all persons claiming by, from or under such bankrupt, by any act done at the time, or after, he shall have committed the act of bankruptcy upon which the commission issued: Provided always, that in case of a bona-fide purchase made before the issuing of the commission from or under such bankrupt, for a valuable consideration, by any person having no knowledge, information or notice of any act of bankruptcy committed, such purchase shall not be invalidated or impeached.

§ 11. And be it further enacted, That the said commissioners shall have power, by deed or deeds, under their hands and seals, to assign and convey to the assignee or assignees to be appointed or chosen as aforesaid, any lands, tenements or hereditaments which such bankrupt shall be seized of or entitled to, in fee tail, at law, or in equity, in possession, remainder or reversion, for the benefit of the creditors; and all such deeds being duly executed and recorded, according to the laws of the State within which such lands, tenements or hereditaments may be situated, shall be good and effectual against all persons whom the said bankrupt, by common recovery, or other means, might or could bar of any estate, right, title of or in the said lands, tenements or hereditaments.

§ 12. And be it further enacted, That if any bankrupt shall have conveyed or assured any lands, goods or estate, unto any person, upon condition or power of redemption, by payment of money or otherwise, it shall be lawful for the commissioners, or for any person by them duly authorized for that purpose, by writing, under their hands and seals, to make tender of money or other performance according to the nature of such condition, as fully as the bankrupt might have done; and the commissioners, after such performance or tender, shall have power to assign such lands, goods and estate for the benefit of the creditors, as fully and effectually as any other part of the estate of such bankrupt.

§ 13. And be it further enacted, That the commissioners aforesaid shall have power to assign, for the use aforesaid, all the debts due to such bankrupt, or to any other person for his or her use or benefit; which assignment shall vest the property and right thereof in the assignee or assignees of such bankrupt, as fully as if the bond, judgment, contract or claim had originally belonged or been made to the said assignees; and after the said assignment, neither the said bankrupt nor any person acting as trustee for him or her, shall have power to recover or discharge the same, nor shall the same be attached as the debt of the said bankrupt; but the assignee or assignees aforesaid shall have such remedy to recover the same, in his or their own name or names, as such bankrupt might or could have had if no commission of bankruptcy had issued. And when any action in the name of such bankrupt shall have been commenced, and shall be pending for the recovery of any debt or effects of such bankrupt, which shall be assigned, or shall or might become vested in the assignee or assignees of such bankrupt as aforesaid, then such assignee or assignees may claim to be, and shall be thereupon, admitted to prosecute such action in his or their name, for the use and benefit of the creditors of such bankrupt; and the same judgment shall be rendered in such action, and all attachments and other security taken therein shall be in like manner holden and liable, as if the said action had been originally commenced in the name of said assignee or assignees, after the original plaintiff therein had become a bankrupt

as aforesaid: Provided, that where a debtor shall have, bona-fide, paid his debt to any bankrupt, without notice that such person was bankrupt, he or she shall not be liable to pay the same to the assignee or assignees.

§ 14. And be it further enacted, That if complaint shall be made or information given to the commissioners, or if they shall have good reason to believe or suspect, that any of the property, goods, chattels, or debts, of the bankrupt are in the possession of any other person, or that any person is indebted to or for the use of the bankrupt, then the said commissioners shall have power to summon, or to cause to be summoned, by their attorney or other person duly authorized by them, all such persons before them, or the judge of the district where such person shall reside, by such process, or other means, as they shall think convenient, and upon their appearance to examine them by parole or by interrogatories, in writing, on oath or affirmation, which oath or affirmation they are hereby empowered to administer, respecting the knowledge of all such property, goods, chattels and debts; and if such person shall refuse to be sworn or affirmed, and to make answer to such questions or interrogatories as shall be administered, and to subscribe the said answers, or upon examination shall not declare the whole truth touching the subject-matter of such examination, then it shall be lawful for the commissioners or judge to commit such person to prison, there to be detained until they shall submit themselves to be examined in manner aforesaid, and they shall, moreover, forfeit double the value of all the property, goods, chattels and debts by them concealed.

§ 15. And be it further enacted, That if any of the aforesaid persons shall, after legal summons to appear before the commissioners or judge, to be examined, refuse to attend, or shall not attend at the time appointed, having no such impediment as shall be allowed of by the commissioners or judge it shall be lawful for the said commissioners or judge to direct their warrants to such person or persons as by them shall be thought proper, to apprehend such persons as shall refuse to appear, and to bring them before the commissioners or judge to be examined, and upon their refusal to come, to commit them to prison, until they shall submit themselves to be examined according to the directions of this act: Provided, that such witnesses as shall be so sent for shall be allowed such compensation as the commissioners or judge shall think fit, to be ratably borne by the creditors; and if any person, other than the bankrupt, either by subornation of others, or by his or her own act, shall wilfully or corruptly commit perjury, shall on conviction thereof be fined not exceeding four thousand dollars and imprisoned not exceeding two years, and moreover shall, in either case, be rendered incapable of being a witness in any court of record.

§ 16. And be it further enacted, That if any person or persons shall fraudulently or collusively claim any debts, or claim or detain

any real or personal estate of the bankrupt, every such person shall forfeit double the value thereof, to and for the use of the creditors.

§ 17. And be it further enacted, That if any person, prior to his or her becoming a bankrupt, shall convey to any of his or her children, or other persons, any lands or goods, or transfer his or her debts or demands into other persons' names, with intent to defraud his or her creditors, the commissioners shall have power to assign the same in as effectual a manner as if the bankrupt had been actually seized or possessed thereof.

§ 18. And be it further enacted, That if any person or persons who shall become bankrupt within the intent and meaning of this act, and against whom a commission of bankruptcy shall be duly issued, upon which commission such person or persons shall be declared bankrupt, shall not, within forty-two days after notice thereof, in writing, to be left at the usual place of abode of such person or persons, or personal notice in case such person or persons be then in prison, and notice given in some gazette, that such commission hath been issued, and of the time and place of meeting of the commissioners, surrender him or herself to the said commissioners, and sign or subscribe such surrender, and submit to be examined, from time to time, upon oath or solemn affirmation, by and before such commissioners, and in all things conform to the provisions of this act, and also upon such his or her examination fully and truly disclose and discover all his or her effects and estate, real and personal, and how and in what manner, to whom and upon what consideration, and at what time or times, he or she hath disposed of, assigned or transferred, any of his or her goods, wares or merchandise, monies or other effects and estate, and of all books, papers and writings relating thereunto of which he or she was possessed, or in or to which he or she was in any way interested or entitled, or which any person or persons shall then have, or shall have had in trust for him or her, or for his or her use, at any time before or after the issuing of the said commission, or whereby such bankrupt, or his or her family, then hath or may have or expect any profit, possibility of profit, benefit or advantage whatsoever, except only such part of his or her estate and effects as shall have been really and bona-fide before sold and disposed of in the way of his or her trade and dealings, and except such sums of money as shall have been laid out in the ordinary expenses of his or her family, and also upon such examination, execute in due form of law such conveyance, assurance and assignment of his or her estate, whatsoever and wheresoever, as shall be devised and directed by the commissioners, to vest the same in the assignees, their heirs, executors, administrators and assigns for ever, in trust, for the use of all and every the creditors of such bankrupt, who shall come in and prove their debts under the commission; and deliver up unto the commissioners all such part of his or her, the said bankrupt's goods, wares, merchandise, money, effects and estate, and all books, papers and writing thereunto re-

lating, as at the time of such examination shall be in his or her possession, custody or power, his or her necessary wearing apparel, and the necessary wearing apparel of the wife and children, and necessary beds and bedding of such bankrupt only excepted, then he or she the said bankrupt, upon the conviction of any wilful default or omission in any of the matters or things aforesaid, shall be adjudged a fraudulent bankrupt, and shall suffer imprisonment for a term not less than twelve months, nor exceeding ten years, and shall not at any time after be entitled to the benefits of this act: Provided always, that in case any bankrupt shall be in prison or custody at the time of issuing such commission, and is willing to surrender and submit to be examined according to the directions of this act, and can be brought before the said commissioners and creditors for that purpose, the expense thereof shall be paid out of the said bankrupt's effects, and in case such bankrupt is in execution, or cannot be brought before the commissioners, that then the said commissioners, or some one of them, shall from time to time attend the said bankrupt in prison or custody, and take his or her discovery as in other cases, and the assignees or one of them, or some person appointed by them, shall attend such bankrupt in prison or custody, and produce his or her books, papers and writings, in order to enable him or her to prepare his or her discovery; a copy whereof the said assignees shall apply for, and the said bankrupt shall deliver to them or their order within a reasonable time after the same shall have been required.

§ 19. And be it further enacted, That the said commissioners shall appoint, within the said forty-two days, so limited as aforesaid, for the bankrupt to surrender and conform as aforesaid, not less than three several meetings for the purposes aforesaid, the third of which meetings shall be on the last of the said forty-two days: Provided always, that the judge of the district within which such commission issues shall have power to enlarge the time so limited as aforesaid, for the purposes aforesaid, as he shall think fit, not exceeding fifty days, to be computed from the end of the said forty-two days, so as such order for enlarging the time be made at least six days before the expiration of said term.

§ 20. And be it further enacted, That it shall be lawful for the commissioners, or any other person or officers by them to be appointed, by their warrant, under their hands and seals, to break open in the day time the houses, chambers, shops, warehouses, doors, trunks or chests, of the bankrupt, where any of his or her goods or estate, deeds, books of account or writings, shall be, and to take possession of the goods, money and other estate, deeds, books of account or writings of such bankrupt.

§ 21. And be it further enacted, That if the bankrupt shall refuse to be examined, or to answer fully, or to subscribe his or her examination as aforesaid, it shall be lawful for the commissioners to commit the offender to close imprisonment until he or she shall conform him or herself; and if the said bankrupt shall submit to be examined,

and upon his or her examination it shall appear that he or she hath committed wilful or corrupt perjury, he or she may be indicted therefor, and being thereof convicted shall suffer imprisonment for a term not less than two years, nor exceeding ten years.

§ 22. And be it further enacted, That every bankrupt having surrendered, shall, at all seasonable times before the expiration of the said forty-two days, as aforesaid, or of such further time as shall be allowed to finish his or her examination, be at liberty to inspect his or her books and writings, in the presence of some person to be appointed by the commissioners, and to bring with him or her, for his or her assistance, such persons as he or she shall think fit, not exceeding two at one time, and to make extracts and copies to enable him or her to make a full discovery of his or her effects; and the said bankrupt shall be free from arrests, in coming to surrender, and after having surrendered to the said commissioners for the said forty-two days, or such farther time as shall be allowed for the finishing his or her examination; and in case such bankrupt shall be arrested for debt, or taken on any escape warrant or execution, coming to surrender, or after his or her surrender within the time before mentioned, then on producing such summons or notice under the hands of the commissioners, and giving the officer a copy thereof, he or she shall be discharged; and in case any officer shall afterwards detain such bankrupt, such officer shall forfeit to such bankrupt, for his or her own use, ten dollars for every day he shall detain the bankrupt.

§ 23. And be it further enacted, That every person who shall knowingly or wilfully receive or keep concealed any bankrupt so as aforesaid summoned to appear, or who shall assist such bankrupt in concealing him or herself, or in absconding, shall suffer such imprisonment, not exceeding twelve months, or pay such fine to the United States, not exceeding one thousand dollars, as upon conviction thereof shall be adjudged.

§ 24. And be it further enacted, That the said commissioners shall have power to examine, upon oath or affirmation, the wife of any person lawfully declared a bankrupt, for the discovery of such part of his estate as may be concealed or disposed of by such wife, or by any other person; and the wife shall incur such penalties for not appearing before the said commissioners, or refusing to be sworn or affirmed or examined, and to subscribe her examination, or for not disclosing the truth, as by this act is provided against any other person in like cases.

§ 25. And be it further enacted, That in case any person shall be committed by the commissioners for refusing to answer, or for not fully answering any question, or for any other cause, the commissioners shall in their warrant specify such question or other cause of commitment.

§ 26. And be it further enacted, That if after the bankrupt shall have finished his or her final examination, any other person or persons



shall voluntarily make discovery of any part of such bankrupt's estate, before unknown to the commissioners, such person or persons shall be entitled to five per cent. out of the effects so discovered, and such further reward as the commissioners shall think proper; and any trustee having notice of the bankruptcy, wilfully concealing the estate of any bankrupt for the space of ten days after the bankrupt shall have finished his final examination, as aforesaid, shall forfeit double the value of the estate so concealed, for the benefit of the creditors.

§ 27. And be it further enacted, That if any bankrupt, after the issuing any commission against him or her, pay to the person who sued out the same, or give or deliver to such person, goods, or any other satisfaction or security for his or her debt, whereby such person shall privately have and receive a greater proportion of his or her debt than the other creditors, such preference shall be a new act of bankruptcy, and on good proof thereof such commission may and shall be superseded, and it shall and may be lawful for either of the judges having authority to grant the commission as aforesaid, to award any creditor petitioning another commission, and such person, so taking such undue satisfaction as aforesaid, shall forfeit and lose, as well his or her whole debts, as the whole he or she shall have taken and received, and shall pay back or deliver up the same, or the full value thereof, to the assignee or assignees who shall be appointed or chosen under such commission, in manner aforesaid, in trust for, and to be divided among, the other creditors of the said bankrupt, in proportion to their respective debts.

§ 28. And be it further enacted, That if any bankrupt, after the issuing any commission against him or her, pay to the person who sued out the same, or give or deliver to such person, goods, or any other satisfaction or security, for his or her debt, whereby such person shall privately have and receive a greater proportion of his or her debt than the other creditors, such preference shall be a new act of bankruptcy, and on good proof thereof, such commission shall and may be superseded, and it shall and may be lawful for either of the judges, having authority to grant the commission as aforesaid, to award any creditor petitioning another commission; and such person, so taking such undue satisfaction as aforesaid, shall forfeit and lose, as well his or her whole debts, as the whole he or she shall have taken and received, and shall pay back, or deliver up the same, or the full value thereof, to the assignee or assignees who shall be appointed or chosen under such commission, in manner aforesaid, in trust for, and to be divided amongst, the other creditors of the said bankrupt, in proportion to their respective debts.

§ 29. And be it further enacted, That every person who shall be chosen assignee of the estate and effects of a bankrupt shall, at some time after the expiration of four months, and within twelve months from the time of issuing the commission, cause at least thirty days public notice to be given of the time and place the commissioners and

assignees intend to meet, to make a dividend or distribution of the bankrupt's estate and effects; at which time the creditors who have not before proved their debts shall be at liberty to prove the same; and upon every such meeting the assignee or assignees shall produce to the commissioners and creditors then present fair and just accounts of all his or their receipts and payments, touching the bankrupt's estate and effects, and of what shall remain outstanding, and the particulars thereof, and shall, if the creditors then present, or a major part of them, require the same, be examined upon oath or solemn affirmation before the same commissioners, touching the truth of such accounts; and in such accounts the said assignee or assignees shall be allowed and retain all such sum and sums of money as they shall have paid or expended in suing out and prosecuting the commission, and all other just allowances on account of or by reason or means of their being assignee or assignees; and the said commissioners shall order such part of the net produce of the said bankrupt's estate as by such accounts or otherwise shall appear to be in the hands of the said assignees, as they shall think fit, to be forthwith divided among such of the bankrupt's creditors as have duly proved their debts under such commission, in proportion to their several and respective debts; and the commissioners shall make such their order for a dividend in writing, under their hands, and shall cause one part of such order to be filed amongst the proceedings under the said commission, and shall deliver to each of the assignees under such commission a duplicate of such their order, which order of distribution shall contain an account of the time and place of making such order, and the sum total or quantum of all the debts proved under the commission, and the sum total of the money remaining in the hands of the assignee or assignees to be divided, and how many per cent. in particular is there ordered to be paid to every creditor of his debt; and the said assignee or assignees, in pursuance of such order, and without any deed or deeds of distribution to be made for the purpose, shall forthwith make such dividend and distribution accordingly, and shall take receipts in a book to be kept for the purpose, from each creditor, for the part or share of such dividend or distribution which he or they shall make and pay to each creditor respectively; and such order and receipt shall be a full and effectual discharge to such assignee for so much as he shall fairly pay, pursuant to such order as aforesaid.

§ 30. And be it further enacted, That within eighteen months next after the issuing of the commission the assignee or assignees shall make a second dividend of the bankrupt's estate and effects, in case the same were not wholly divided upon the first dividend, and shall cause due public notice to be given of the time and place the said commissioners intend to meet to make a second distribution of the bankrupt's estate and effects, and for the creditors who shall not before have proved their debts to come in and prove the same; and at said meeting the said assignees shall produce, on oath or solemn affirma-

tion as aforesaid, their account of the bankrupt's estate and effects, and what upon the balance thereof shall appear to be in their hands shall, by like order of the commissioners, be forthwith divided amongst such of the bankrupt's creditors as shall have made due proof of their debts, in proportion to their several and respective debts, which second dividend shall be final, unless any suit at law or in equity be pending, or any part of the estate standing out that could not have been disposed of, or that the major part of the creditors shall not have agreed to be sold or disposed of, or unless some other or future estate or effects of the bankrupt shall afterwards come to or vest in the said assignees, in which cases the said assignees shall, as soon as may be, convert such future or other estate and effects into money, and shall within two months after the same be converted into money, by like order of the commissioners, divide the same among such bankrupt's creditors as shall have made due proof of their debt under such commission.

§ 31. And be it further enacted, That in the distribution of the bankrupt's effects there shall be paid to every one of the creditors a portion-rate according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance, or specialty, or having an attachment under any of the laws of the individual States, or of the United States, on the estate of such bankrupt, (Provided, there be no execution executed upon any of the real or personal estate of such bankrupt before the time he or she became bankrupts) shall not be relieved upon any such judgment, statute, recognizance, specialty or attachment, for more than a ratable part of his debt, with the other creditors of the bankrupt.

§ 32. And be it further enacted, That the assignees shall keep one or more distinct book or books of account, wherein he or they shall duly enter all sums of money or effects which he or they shall have received or got into his or their possession, of the said bankrupt's estate, to which books of account every creditor who shall have proved his or her debt shall, at all reasonable times, have free resort and inspect the same as often as he or she shall think fit.

§ 33. And be it further enacted, That every bankrupt, not being in prison or custody, shall at all times after his surrender be bound to attend the assignees upon every reasonable notice, in writing, for that purpose, given or left at the usual place of his or her abode, in order to assist in making out the accounts of the said bankrupt's estate and effects, and to attend any court of record, to be examined touching the same, or such other business as the said assignee shall judge necessary, for which he shall receive three dollars per day.

§ 34. And be it further enacted, That all and every person and persons who shall become bankrupt as aforesaid, and who shall within the time limited by this act surrender him or herself to the commissioners, and in all things conform as in and by this act is directed,

shall be allowed five per cent. upon the net produce of all the estate that shall be recovered in and received, which shall be paid unto him or her by the assignee or assignees, in case the net produce of such estate, after such allowance made, shall be sufficient to pay the creditors of said bankrupt who shall have proved their debts under such commission the amount of fifty per cent. on their said debts, respectively, and so as the said five per cent. shall not exceed, in the whole, the sum of five hundred dollars; and in case the net produce of the said estate shall, over and above the allowance hereafter mentioned, be sufficient to pay the said creditors seventy-five per cent. on the amount of their said debts, respectively, that then the said bankrupt shall be allowed ten per cent. on the amount of such net produce, to be paid as aforesaid, so as such ten per cent. shall not, in the whole, exceed the sum of eight hundred dollars; and every such bankrupt shall be discharged from all debts by him or her due or owing at the time he or she became bankrupt, and all which were or might have been proved under the said commission; and in case any such bankrupt shall afterwards be arrested or prosecuted or impleaded, for or on account of any of the said debts, such bankrupt may appear without bail, and may plead the general issue, and give this act and the special matter in evidence. And the certificate of such bankrupt's conforming, and the allowance thereof, according to the directions of this act, shall be, and shall be allowed to be, sufficient evidence, prima facie, of the party's being a bankrupt within the meaning of this act, and of the commission and other proceedings precedent to the obtaining such certificate, and a verdict shall thereupon pass for the defendant, unless the plaintiff in such action can prove the said certificate was obtained unfairly and by fraud, or unless he can make appear any concealment of estate or effects by such bankrupt to the value of one hundred dollars. Provided, That no such discharge of a bankrupt shall release or discharge any person who was a partner with such bankrupt at the time he or she became bankrupt, or who was then jointly held or bound with such bankrupt for the same debt or debts from which such bankrupt was discharged as aforesaid.

§ 35. Provided always, and be it further enacted, That if the net proceeds of the bankrupt's estate, so to be discovered, recovered and received, shall not amount to so much as will pay all and every of the creditors of the said bankrupt who shall have proved their debts under the said commission, the amount of fifty per cent. on their debts respectively, after all charges first deducted, that then and in such case the bankrupt shall not be allowed five per centum on such estate as shall be recovered in, but shall have and be paid by the assignees so much money as the commissioners shall think fit to allow, not more than three hundred dollars, nor exceeding three per centum on the net proceeds of the said bankrupt's estate.

§ 36. Provided also, and be it further enacted, That no person becoming a bankrupt according to the intent and provisions of this act

shall be entitled to a certificate of discharge, or to any of the benefits of the act, unless the commissioners shall certify under their hands to the judge of the district within which such commission issues that such bankrupt hath made a full discovery of his or her estate and effects, and in all things conformed him or herself to the directions of this act, and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same was not a full discovery of the said bankrupt's estate and effects, and in all things conformed him or herself to the directions of this act, and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same was not a full discovery of the said bankrupt's estate and effects; or unless the said judge should be of opinion that the said certificate was unreasonably denied by the commissioners; and unless two-thirds, in number and in value, of the creditors of the bankrupt, who shall be creditors for not less than fifty dollars respectively, and who shall have duly proved their debts under the said commission, shall sign such certificate to the judge, and testify their consent to the allowance of a certificate of discharge in pursuance of this act; which signing and consent shall be also certified by the commissioners; but the said commissioners shall not certify the same till they have proof by affidavit or affirmation, in writing, of such creditors, or of the persons respectively authorized for that purpose signing the said certificate; which affidavit or affirmation, together with the letter or power of attorney to sign, shall be laid before the judge of the district within which such commission issues, in order for the allowing the certificate of discharge, and the said certificate shall not be allowed unless the bankrupt make oath or affirmation in writing that the certificate of the commissioners and consent of the creditors thereunto were obtained fairly and without fraud; and any of the creditors of the said bankrupt are allowed to be heard, if they shall think fit, before the respective persons aforesaid, against the making or allowing of such certificates by the commissioners or judge.

§ 37. And be it further enacted, That if any creditor, or pretended creditor, of any bankrupt shall exhibit to the commissioners any fictitious or false debt or demand, with intent to defraud the real creditors of such bankrupt, and the bankrupt shall refuse to make discovery thereof and suffer the fair creditors to be imposed upon, he shall lose all title to the allowance upon the amount of his effects and to a certificate of discharge as aforesaid, nor shall he be entitled to the said allowance or certificate if he has lost at any one time fifty dollars, or in the whole three hundred dollars, after the passing of this act and within twelve months before he became a bankrupt, by any manner of gaming or wagering whatever.

§ 38. And be it further enacted, That if any bankrupt who shall have obtained his certificate shall be taken in execution or detained in prison on account of any debts owing before he became a bankrupt,

by reason that judgment was obtained before such certificate was allowed, it shall be lawful for any of the judges of the court wherein judgment was so obtained, or for any court, judge or justice, within the district in which such bankrupt shall be detained, having powers to award or allow the writ of habeas corpus, on such bankrupt producing his certificate so as aforesaid allowed, to order any sheriff or gaoler who shall have such bankrupt in custody to discharge such bankrupt without fee or charge, first giving reasonable notice to the plaintiff, or his attorney, of the motion for such discharge.

§ 39. And be it further enacted, That every person who shall have bona-fide given credit to or taken securities, payable at future days, from persons who are or shall become bankrupts, not due at the time of such persons becoming bankrupt, shall be admitted to prove their debts and contracts as if they were payable presently, and shall have a dividend in proportion to the other creditors, discounting, where no interest is payable, at the rate of so much per centum per annum, as is equal to the lawful interest of the State where the debt was payable, and the obligee of any bottomry or respondentia bond, and the assured in any policy of insurance, shall be admitted to claim, and after the contingency or loss to prove the debt thereon, in like manner as if the same had happened before issuing the commission; and the bankrupt shall be discharged from such securities as if such money had been due and payable before the time of his or her becoming bankrupt; and such creditors may petition for a commission, or join in petitioning.

§ 40. And be it further enacted, That in case any person committed by the commissioners' warrant shall obtain a habeas corpus, in order to be discharged, and there shall appear any insufficiency in the form of the warrant, it shall be lawful for the court or judge before whom such party shall be brought by habeas corpus, by rule or warrant, to commit such persons to the same prison, there to remain until he shall conform as aforesaid, unless it shall be made to appear that he had fully answered all lawful questions put to him by the commissioners; or in case such person was committed for not signing his examination, unless it shall appear that the party had good reason for refusing to sign the same, or that the commissioners had exceeded their authority in making such commitment; and in case the gaoler to whom such person shall be committed shall wilfully or negligently suffer such person to escape, or go without the doors or walls of the prison, such gaoler shall for such offense, being convicted thereof, forfeit a sum not exceeding three thousand dollars, for the use of the creditors.

§ 41. And be it further enacted, That the gaoler shall, upon the request of any creditor having proved his debt and showing a certificate thereof under the hands of the commissioners, which the commissioners shall give without fee or reward, produce the person so committed; and in case such gaoler shall refuse to show such person

to such creditor requesting the same, such person shall be considered as having escaped, and the gaoler or sheriff so refusing shall be liable as for a wilful escape.

§ 42. And be it further enacted, That where it shall appear to the said commissioners that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between them at any time before such person became bankrupt, the assignee or assignees of the estate shall state the account between them, and one debt may be set off against the other, and what shall appear to be due on either side on the balance of such account after such set off, and no more, shall be claimed or paid on either side respectively.

§ 43. And be it further enacted, That it shall and may be lawful to and for the assignee or assignees of any bankrupt's estate and effects, under the direction of the commissioners, and by and with the consent of the major part in value of such of the said bankrupt's creditors as shall have duly proved their debts under the commission, and shall be present at any meeting of the said creditors, to be held in pursuance of due and public notice for that purpose given, to submit any difference or dispute for, on account of, or by reason or means of, any matter, cause, or thing whatsoever, relating to such bankrupt, or to his or her estate or effects, to the final end and determination of arbitrators to be chosen by the said commissioners, and the major part in value of such creditors as shall be present at such meeting as aforesaid, in such manner as the said assignee or assignees, under the direction and with the consent aforesaid, shall think fit and can agree; and the same shall be binding on the several creditors of the said bankrupt, and the said assignee or assignees are hereby indemnified for what they shall fairly do, according to the directions aforesaid.

§ 44. And be it further enacted, That the assignees shall be, and hereby are, vested with full power to dispose of all the bankrupt's estate, real and personal, at public auction or vendue, without being subject to any tax, duty, imposition, or restriction, any law to the contrary notwithstanding.

§ 45. And be it further enacted, That if after any commission of bankruptcy sued forth, the bankrupt happen to die before the commissioners shall have distributed the effects, or any part thereof, the commissioners shall nevertheless proceed to execute the commission as fully as they might have done if the party were living.

§ 46. And be it further enacted, That where any commission of bankruptcy shall be delivered to the commissioners therein named, to be executed, it shall and may be lawful for them before they take the oath or affirmation of qualification, to demand and take from the creditor or creditors prosecuting such commission a bond with one good security, if required, in the penalty of one thousand dollars, conditioned for the payment of the costs, charges and expenses which shall arise and accrue upon the prosecution of the said commission:

Provided always, that the expenses so as aforesaid to be secured and paid by the petitioning creditor or creditors shall be repaid to him or them by the commissioner or assignees out of the first monies arising from the bankrupt's estate or effects, if so much be received therefrom.

§ 47. And be it further enacted, That the district judges in each district respectively shall fix a rate of allowance to be made to the commissioners of bankruptcy, as compensation of services to be rendered under the commission, and it shall be lawful for any creditor, by petition to the district judge, to except to any charge contained in the account of the commissioners: and the said judge, after hearing the commissioners, may in a summary way decide upon the validity of such exception.

§ 48. And be it further enacted, That all penalties given by this act for the benefit of the creditors shall be recovered by the assignee or assignees by action of debt, and the money so recovered, the charges of suit being deducted, shall be distributed towards payment of the creditors.

§ 49. And be it further enacted, That if any action shall be brought against any commissioner, or assignee or other person, having authority under the commission, for anything done and performed by force of this act, the defendant may plead the general issue, and give this act and the special matter in evidence; and in case of a non-suit, discontinuance, or verdict or judgment for him, he shall recover double costs.

§ 50. And be it further enacted, That if any estate, real or personal, shall descend, revert to, or become vested in any person after he or she shall be declared a bankrupt, and before he or she shall obtain a certificate signed by the judge as aforesaid, all such estate shall, by virtue of this act, be vested in the said commissioners, and shall be by them assigned and conveyed to the assignee or assignees in fee simple or otherwise, in like manner as above directed, with the estate of the said bankrupt, at the time of the bankruptcy, and the proceeds thereof shall be divided among the creditors.

§ 51. And be it further enacted, That the said commissioners shall, once in every year, carefully file in the clerk's office of the district court all the proceedings had in every case before them, and which shall have been finished, including the commissions, examinations, dividends, entries and other determinations of the said commissioners, in which office the final certificate of the said bankrupt may also be recorded; all which proceedings shall remain of record in the said office, and certified copies thereof shall be admitted as evidence in all courts, in like manner as the copies of the proceedings of the said district court are admitted in other cases.

§ 52. And be it further enacted, That it shall and may be lawful for any creditor of such bankrupt to attend all or any of the examinations of said bankrupt, and the allowance of the final certificate, if he



shall think proper, and then and there to propose interrogatories to be put by the judge or commissioners to the said bankrupt and others, and also to produce and examine witnesses and documents before such judge or commissioners, relative to the subject-matter before them. And in case either the bankrupt or creditor shall think him or herself aggrieved by the determination of the said judge or commissioners, relative to any material fact in the commencement or progress of the said proceedings, or in the allowance of the certificate aforesaid, it shall and may be lawful for either party to petition the said judge, setting forth such facts and the determination thereon, with the complaint of the party, and a prayer for trial by jury to determine the same, and the said judge shall, in his discretion, make order thereon, and reward a venire facias to the marshal of the district, returnable within fifteen days before him, for the trial of the facts mentioned in the said petition, notice whereof shall be given to the commissioners and creditors concerned in the same; at which time the trial shall be had, unless, on good cause shown, the judge shall give farther time, and judgment being entered on the verdict of the jury shall be final on the said facts, and the judge or commissioners shall proceed agreeably thereto.

§ 53. And be it further enacted, That the commissioners before the appointment of assignees, and the assignees after such appointment, may from time to time make such allowance out of the bankrupt's estate until he shall have obtained his final discharge, as in their opinion may be requisite for the necessary support of the said bankrupt and his family.

§ 54. And be it further enacted, That it shall be lawful for the major part in value of the creditors, before they proceed to the choice of assignees, to direct in what manner, with whom and where, the monies arising by and to be received from time to time out of the bankrupt's estate shall be lodged, until the same shall be divided among the creditors, as herein provided; to which direction every such assignee and assignees shall conform as often as three hundred dollars shall be received.

§ 55. And be it further enacted, That every matter and thing by this act required to be done by the commissioners of any bankrupt shall be valid to all intents and purposes, if performed by a majority of them.

§ 56. And be it further enacted, That in all cases where the assignee shall prosecute any debtor of the bankrupt for any debt, duty or demand, the commission, or a certified copy thereof, and the assignment of the commissioners of the bankrupt's estate, shall be conclusive evidence of the issuing the commission and of the person named therein being a trader and bankrupt at the time mentioned therein.

§ 57. And be it further enacted, That every person obtaining a discharge from his debts, by certificate as aforesaid, granted under a

commission of bankruptcy, shall not on any future commission be entitled to any other certificate than a discharge of his person only; unless the net proceeds of the estate and effects of such person so becoming bankrupt a second time shall be sufficient to pay seventy-five per cent. to his or her creditors on the amount of their debts respectively.

§ 58. And be it further enacted, That any creditor of a person against whom a commission of bankruptcy shall have been sued forth, and who shall lay his claim before the commissioners appointed in pursuance of this act, may at the same time declare his unwillingness to submit the same to the judgment of the said commissioners, and his wish that a jury may be impanelled to decide thereon: And in like manner the assignee or assignees of such bankrupt may object to the consideration of any particular claim by the commissioners, and require that the same should be referred to a jury. In either case such objection and request shall be entered on the books of the commissioners, and thereupon an issue shall be made up between the parties, and a jury shall be impaneled, as in other cases, to try the same in the circuit court for the district in which such bankrupt has usually resided. The verdict of such jury shall be subject to the control of the court, as in suits originally instituted in the said court, and when rendered, if not set aside by the said court, shall be certified to the commissioners, and shall ascertain the amount of any such claim, and such creditor or creditors shall be considered in all respects as having proved their debts under the commission.

§ 59. And be it further enacted, That the lands and effects of any person becoming bankrupt may be sold on such credit, and on such security, as a major part in value of the creditors may direct: Provided, nothing herein contained shall be allowed so to operate as to retard the granting the bankrupt's certificate.

§ 60. And be it further enacted, That if any person becoming bankrupt shall be in prison, it shall be lawful for any creditor or creditors, at whose suit he or she shall be in execution, to discharge him or her from custody, or if such creditor or creditors shall refuse to do so, the prisoner may petition the commissioners to liberate him or her, and thereupon, if in the opinion of the commissioners the conduct of such bankrupt shall have been fair, so as to entitle him or her in their opinion to a certificate, when by law such certificate might be given, it shall be lawful for them to direct the discharge of such prisoner, and to enter the same in their books, which being notified to the keeper of the gaol in which such prisoner may be confined shall be a sufficient authority for his or her discharge: Provided, that in either case, such discharge shall be no bar to another execution, if a certificate shall be refused to such bankrupt: And provided also, that it shall be no bar to a subsequent imprisonment of such bankrupt by order of the commissioners, in conformity with the provisions of this act.

§ 61. And be it further enacted, That this act shall not repeal or annul, or be construed to repeal or annul, the laws of any State now in force, or which may be hereafter enacted, for the relief of insolvent debtors, except so far as the same may respect persons who are or may be clearly within the purview of this act, and whose debts shall amount in the cases specified in the second section thereof to the sums herein mentioned. And if any person within the purview of this act shall be imprisoned for the space of three months, for any debt or upon any contract, unless the creditors of such prisoner shall proceed to prosecute a commission of bankruptcy against him or her, agreeably to the provisions of this act, such debtor may and shall be entitled to relief, under any such laws for the relief of insolvent debtors, this act notwithstanding.

§ 62. And be it further enacted, That nothing contained in this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States or to any of them.

§ 63. And be it further enacted, That nothing contained in this act shall be taken or construed to invalidate or impair any lien existing at the date of this act upon the lands or chattels of any person who may have become a bankrupt.

§ 64. And be it further enacted, That this act shall continue in force during the term of five years, and from thence to the end of the next session of congress thereafter, and no longer: Provided, that the expiration of this act shall not prevent the complete execution of any commission which may have been previously thereto issued.

Approved, April 4, 1800.

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ACT OF FEBRUARY 13, 1801.

*An Act to provide for the more convenient organization of the Courts of the United States.*

(Repealed by Act of March 8, 1802, chap. 8.)

§ 12. [Being the only part of said act relating to the subject of bankruptcy.] The said circuit courts respectively shall have cognizance, concurrently with the district courts, of all cases which shall arise, within their respective circuits, under the act to establish a uniform system of bankruptcy throughout the United States; and each circuit judge, within his respective circuit, shall and may perform, all and singular, the duties enjoined by the said act upon a judge of a district court: and the proceedings under a commission of bankruptcy which shall issue from a circuit judge shall, in all respects, be conformable to the proceedings under a commission of bankruptcy which shall issue from a district judge, mutatis mutandis.

ACT OF APRIL 29, 1802.

*An Act to amend the judicial system of the United States.*

§ 11. [Being the only part of said act relating to the subject of bankruptcy.] In all cases in which proceedings shall, on the said first day of July next, be pending under a commission of bankruptcy issued in pursuance of the aforesaid act, entitled "An act to provide for the more convenient organization of the courts of the United States," the cognizance of the same shall be, and hereby is, transferred to, and vested in, the district judge of the district within which such commission shall have issued, who is hereby empowered to proceed therein in the same manner and to the same effect as if such commission of bankruptcy had been issued by his order.

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ACT OF DECEMBER 19, 1803.

*An Act to repeal an act entitled "An act to establish an uniform system of bankruptcy throughout the United States."*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the act of Congress passed on the fourth day of April, one thousand, eight hundred, entitled "An act to establish an uniform system of bankruptcy throughout the United States," shall be, and the same is hereby, repealed. Provided, nevertheless, that the repeal of the said act shall in no wise affect the execution of any commission of bankruptcy which may have been issued prior to the passing of this act, but every such commission may and shall be proceeded on and fully executed as though this act had not passed.

Approved, December 19, 1803.

## TITLE II.

# THE LAW AND PRACTICE OF BANKRUPTCY.

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BANKRUPTCY ACT OF AUGUST 19, 1841.

*An Act to establish a uniform System of Bankruptcy throughout the United States.*<sup>1</sup>

(Repealed, March 3, 1843, chap. 82.)

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, established throughout the United States a uniform system of bankruptcy, as follows: All persons whatsoever, residing in any State, District or Territory of the United States, owing debts which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, who shall, by petition, setting forth to the best of his knowledge and belief a list of his or their creditors, their respective places of residence, and the amount due to each, together with an accurate inventory of his or their property, rights and credits, of every name,

### DECISIONS ON LAWS OF 1841.

<sup>1</sup> See notes of the decisions of the courts of the United States on the bankruptcy act of April 4, 1800.

In the case of Nelson, a petitioner in bankruptcy in the Kentucky district, and Carland, an opposing creditor, several points were adjourned by the District to the Circuit Court. Upon the hearing of the case in the Circuit Court, the district judge, as well as the justices of the Supreme Court, sat in the case; and, being opposed in opinion upon questions adjourned from the District Court, they were certified to the Supreme Court on the motion of the counsel of the petitioner. *Held*; that the district judge cannot sit as a member

of the circuit Court, under the "Act to establish a uniform system of bankruptcy throughout the United States." Consequently, the points adjourned could not be brought before the Supreme Court on a certificate of division. *Nelson v. Carland*, 17 Pet. 181; *id.* 1 How. 265.

An appeal or writ of error will not lie from the decision of the Circuit Court, in a case of bankruptcy adjourned from the District Court. The decision of the Circuit Court is conclusive on the district judge. *Ibid.*

Under the late bankruptcy act of the United States, the existence of a fiduciary debt contracted before the passage of the act constitutes no objection to the discharge of the

kind and description, and the location and situation of each and every parcel and portion thereof, verified by oath, or, if conscientiously scrupulous of taking an oath, by solemn affirmation, apply to the proper court, as hereinafter mentioned, for the benefit of this act, and therein declare themselves to be unable to meet their debts and engagements, shall be deemed bankrupts within the purview of this act, and may be so declared accordingly by a decree of such court. All persons, being merchants, or using the trade of merchandise, all retailers of merchandise, and all bankers, factors, brokers, underwriters or marine insurers, owing debts to the amount of not less than two thousand dollars, shall be liable to become bankrupts within the true intent and meaning of this act, and may, upon the petition of one or

debtor from other debts. *Chapman v. Forsyth*, 2 How. 202.

A factor who receives the money of his principal is not a fiduciary, within the meaning of the act. *Ibid.*

A bankrupt is bound to state upon his schedule the nature of a debt if it be a fiduciary one. Should he omit to do so he would be guilty of a fraud, and his discharge will not avail him; but if a creditor, in such case, proves his debt and receives a dividend from the estate, he is estopped from afterward saying that his debt was not within the law. *Ibid.*

But if the fiduciary creditor does not prove his debt, he may recover it afterward from the discharged bankrupt by showing that it was within the exceptions of the act. *Ibid.*

In Kentucky, the creditor obtains a lien upon the property of his debtor by the delivery of a fi. fa. to the sheriff; and this lien is as absolute before the levy as it is afterward. *Savage's Assignee v. Best*, 3 How. 111.

Therefore a creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor committed before the levy is made, but after the execution is in the hands of the sheriff. *Ibid.*

This court has no revising power over the decrees of the District Court sitting in bankruptcy; nor is it authorized to issue a writ of prohibition to it in any case, except where the District Court is proceeding as a court of admiralty and maritime jurisdiction. *Ex parte Christy*, 3 How. 202.

The District Court, when sitting in bankruptcy, has jurisdiction over liens and mortgages existing upon the property of a bankrupt, so as to inquire into their validity and extent, and grant the same relief which the state courts might or ought to grant. *Ibid.*

The control of the District Court over proceedings in the state courts upon such liens is exercised, not over the state courts themselves, but upon the parties, through an injunction or other appropriate proceeding in equity. *Ibid.*

The design of the bankruptcy act was to secure a prompt and effectual administration of the estate of all bankrupts, worked out by the courts of the United States without the assistance of state tribunals. *Ibid.*

The phrase in the sixth section, "any creditor or creditors who shall claim any debt or demand under the bankruptcy," does not mean only

more of their creditors, to whom they owe debts amounting in the whole to not less than five hundred dollars, to the appropriate court, be so declared accordingly, in the following cases, to wit: whenever such person, being a merchant, or actually using the trade of merchandise, or being a retailer of merchandise, or being a banker, factor, broker, underwriter, or marine insurer, shall depart from the State, District or Territory, of which he is an inhabitant, with intent to defraud his creditors; or shall conceal himself to avoid being arrested, or shall willingly and fraudulently procure himself to be arrested, or his goods and chattels, lands or tenements, to be attached, distrained, sequestered, or taken in execution; or shall remove his goods, chattels and effects, or conceal them to prevent their being levied upon or taken in execution, or by other process; or make any fraudulent conveyance, assignment, sale, gift or other transfer of his lands, tenements, goods or chattels, credits or evidence of debt: Provided, however, That any person so declared a bankrupt, at the instance of a creditor, may, at his election, by petition to such court within ten days after its decree, be entitled to a trial by jury before such court, to ascertain the fact of such bankruptcy; or if such person shall reside at a great distance from the place of holding such court, the said judge, in his discretion, may direct such trial by jury to be had in the county of such person's residence, in such manner and under such directions as the court may prescribe and give; and all such decrees passed by such court, and not so re-examined, shall be deemed final and conclusive as to the subject-matter thereof.

§ 2. And be it further enacted, That all future payments, securities, conveyances, or transfers of property, or agreement made or given

such creditors who come in and New Orleans, In the Matter of prove their debts, but all creditors Christy, Assignee of Walden, re- who have a present, subsisting claim viewed and confirmed. Ibid. upon the bankrupt's estate, whether But this court does not decide they have a security or mortgage whether or not the jurisdiction of the therefor or not. Ibid. District Court over all the property

Such creditors have a right to of a bankrupt, mortgaged or otherwise, is exclusive, so as to take it ask that the property mortgaged shall be sold, and the proceeds applied toward the payment of their away from the state courts in such cases. Norton's Assignee v. Boyd, debts; and the assignee, on the other 3 How. 426. hand, may contest their claims. Ibid.

In the case of a contested claim, the District Court has jurisdiction, if resort be had to a formal bill in equity or other plenary proceeding; and also jurisdiction to proceed summarily. Ibid.

The principles established in the case of *Ex parte the City Bank of*

Where the defendant below became a bankrupt, the Supreme Court will not award a supersedeas to stay an execution, because the assignee of the bankrupt has his remedy in the Circuit Court. *Black v. Zacharie*, 3 How. 483.

(For bankruptcy act of March 2, 1867, and its amendments, with annotations, see pages 94 et seq.)

by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person, any preference or priority over the general creditors of such bankrupts; and all other payments, securities, conveyances, or transfers of property, or agreements made or given by such bankrupt in contemplation of bankruptcy, to any person or persons whatever, not being a bona-fide creditor or purchaser, for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act; and the assignee under the bankruptcy shall be entitled to claim, sue for, recover, and receive, the same as part of the assets of the bankruptcy; and the person making such unlawful preferences and payments shall receive no discharge under the provisions of this act: Provided, That all dealings and transactions by and with any bankrupt, bona-fide made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or affected by this act: Provided, That the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act. And in case it shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary, has, subsequent to the first day of January last, or at any other time, in contemplation of the passage of a bankrupt law, by assignments or otherwise, given or secured any preference to one creditor over another, he shall not receive a discharge unless the same be assented to by a majority in interest of those of his creditors who have not been so preferred: And provided also, That nothing in this act contained shall be construed to annul, destroy or impair, any lawful rights of married women, or minors, or any liens, mortgages, or other securities, on property, real or personal, which may be valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act.

§ 3. And be it further enacted, That all the property, and rights of property, of every name and nature, and whether real, personal or mixed, of every bankrupt, except as is hereinafter provided, who shall, by a decree of the proper court, be declared to be a bankrupt within this act, shall, by mere operation of law, ipso facto, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment or other conveyance whatsoever; and the same shall be vested, by force of the same decree, in such assignee as from time to time shall be appointed by the proper court for this purpose, which power of appointment and removal such court may exercise at its discretion, toties quoties; and the assignee so appointed shall be vested with all the rights, titles, powers and authorities to sell, manage and dispose of the same, and to sue for and defend the same, subject to the orders and directions of such court, as fully, to all intents and purposes, as if the same were vested in or might be exercised by such bankrupt before or at the time of his



bankruptcy declared as aforesaid; and all suits in law or in equity then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion, in the same way and with the same effect as they might have been by such bankrupt; and no suit commenced by or against any assignee shall be abated by his death or removal from office, but the same may be prosecuted or defended by his successor in the same office: Provided, however, That there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of three hundred dollars; and, also, the wearing apparel of such bankrupt, and that of his wife and children; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of said court.

§ 4. And be it further enacted, That every bankrupt who shall bona-fide surrender all his property, and rights of property, with the exception before mentioned, for the benefit of his creditors, and shall fully comply with and obey all the orders and directions which may from time to time be passed by the proper court, and shall otherwise conform to all the requisitions of this act, shall (unless a majority in number and value of his creditors who have proved their debts shall file their written dissent thereto) be entitled to a full discharge from all his debts, to be decreed and allowed by the court which has declared him a bankrupt, and a certificate thereof granted him by such court accordingly, upon his petition filed for such purpose; such discharge and certificate not, however, to be granted until after seventy days' notice in some public newspaper, designated by such court, to all creditors who have proved their debts, and other persons in interest, to appear at a particular time and place, to show cause why such discharge and certificate shall not be granted; at which time and place any such creditors, or other persons in interest, may appear and contest the right of the bankrupt thereto: Provided, That in all cases where the residence of the creditor is known, a service on him personally, or by letter addressed to him at his known usual place of residence, shall be prescribed by the court, as in their discretion shall seem proper, having regard to the distance at which the creditor resides from such court. And if any such bankrupt shall be guilty of any fraud or wilful concealment of his property or rights of property, or shall have preferred any of his creditors contrary to the provisions of this act, or shall wilfully omit or refuse to comply with any orders or directions of such court, or to conform to any other requisites of this act, or shall, in the proceedings under this act, admit a false or fictitious debt against his estate, he shall not be entitled to any such discharge or certificate; nor shall any person, being a merchant, banker, factor, underwriter, broker, or

marine insurer, be entitled to any such discharge or certificate, who shall become bankrupt, and who shall not have kept proper books of account, after the passing of this act; nor any person who, after the passing of this act, shall apply trust funds to his own use: Provided, That no discharge of any bankrupt under this act shall release or discharge any person who may be liable for the same debt as a partner, joint contractor, indorser, surety, or otherwise, for or with the bankrupt. And such bankrupt shall at all times be subject to examination, orally, or upon written interrogatories, in and before such court, or any commission appointed by the court therefor, on oath, or, if conscientiously scrupulous of taking an oath, upon his solemn affirmation, in all matters relating to such bankruptcy, and his acts and doings, and his property and rights of property, which, in the judgment of such court, are necessary and proper for the purposes of justice; and if, in any such examination, he shall wilfully and corruptly answer, or swear, or affirm, falsely, he shall be deemed guilty of perjury, and shall be punishable therefor in like manner as the crime of perjury is now punishable by the laws of the United States; and such discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts and other engagements of such bankrupt which are provable under this act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence of itself in favor of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property or rights of property, as aforesaid, contrary to the provisions of this act, on prior reasonable notice specifying in writing such fraud or concealment; and if, in any case of bankruptcy, a majority in number and value of the creditors who shall have proved their debts at the time of hearing of the petition of the bankrupt for a discharge, as hereinbefore provided, shall at such hearing file their written dissent to the allowance of a discharge and certificate to such bankrupt, or if, upon such hearing, a discharge shall not be decreed to him, the bankrupt may demand a trial by jury upon a proper issue to be directed by the court, at such time and place and in such manner as the court may order; or he may appeal from that decision at any time within ten days thereafter to the circuit court next to be held for the same district, by simply entering in the district court, or with the clerk thereof, upon record, his prayer for an appeal. The appeal shall be tried at the first term of the circuit court after it be taken, unless, for sufficient reason, a continuance be granted; and it may be heard and determined by said court summarily, or by a jury, at the option of the bankrupt; and the creditors may appear and object against a decree of discharge and the allowance of the certificate, as hereinbefore provided. And if, upon a full hearing of the parties, it shall appear to the satisfaction of the court, or the jury shall find, that the bankrupt has made a full disclosure and surrender of all his

estate, as by this act required, and has in all things conformed to the directions thereof, the court shall make a decree of discharge, and grant a certificate, as provided in this act.

§ 5. And be it further enacted, That all creditors coming and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being bona-fide debts, shall be entitled to share in the bankrupt's property and effects, pro rata, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid monies as his sureties, which shall be first paid out of the assets; and any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of the wages due to him for such labor, not exceeding twenty-five dollars: Provided, That such labor shall have been performed within six months next before the bankruptcy of his employer; and all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, indorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof ascertained, under the direction of such court, and allowed them accordingly, as debts in present; and no creditor or other person coming in and proving his debt or other claim shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby; and in all cases where there are mutual debts or mutual credits between the parties, the balance only shall be deemed the true debt or claim between them, and the residue shall be deemed adjusted by the set-off; all such proof of debts shall be made before the court decreeing the bankruptcy, or before some commissioner appointed by the court for that purpose; but such court shall have full power to disallow and set aside any debt, upon proof that such debt is founded in fraud, imposition, illegality, or mistake; and corporations to whom any debts are due may make proof thereof by their president, cashier, treasurer, or other officer, who may be specially appointed for that purpose; and in appointing commissioners to receive proof of debts, and perform other duties under the provisions of this act, the said court shall appoint such persons as have their residence in the county in which such bankrupt lives.

§ 6. And be it further enacted, That the district court in every district shall have jurisdiction in all matters and proceedings in bank-

ruptcy arising under this act, and any other act which may hereafter be passed upon the subject of bankruptcy; the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity; and for this purpose the said district court shall be deemed always open. And the district judge may adjourn any point or question arising in any case in bankruptcy into the circuit court for the district, in his discretion, to be there heard and determined; and for this purpose the circuit court of such district shall also be deemed always open. And the jurisdiction hereby conferred on the district court shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed; to all cases and controversies between such assignee and the bankrupt, and to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. And the said courts shall have full authority and jurisdiction to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent the circuit courts may now do in any suit pending therein in equity. And it shall be the duty of the district court in each district, from time to time, to prescribe suitable rules and regulations, and forms of proceedings, in all matters of bankruptcy; which rules, regulations and forms, shall be subject to be altered, added to, revised, or annulled, by the circuit court of the same district, and other rules and regulations and forms substituted therefor; and in all such rules, regulations and forms it shall be the duty of the said courts to make them as simple and brief as practicable, to the end to avoid all unnecessary expenses, and to facilitate the use thereof by the public at large. And the said courts shall, from time to time, prescribe a tariff or table of fees and charges to be taxed by the officers of the court or other persons for services under this act, or any other on the subject of bankruptcy; which fees shall be as low as practicable, with reference to the nature and character of such services.

§ 7. And be it further enacted, That all petitions by any bankrupt for the benefit of this act, and all petitions by a creditor against any bankrupt under this act, and all proceedings in the case to the close thereof, shall be had in the district court within and for the district in which the person supposed to be a bankrupt shall reside, or have his place of business, at the time when such petition is filed, except where otherwise provided in this act. And upon every such petition, notice thereof shall be published in one or more public newspapers printed in such district, to be designated by such court, at least twenty days before the hearing thereof; and all persons interested may appear at the time and place where such hearing is thus to be had, and show cause, if any they have, why the prayer of the said

petitioner should not be granted; all evidence by witnesses to be used in all hearings before such court shall be under oath, or solemn affirmation, when the party is conscientiously scrupulous of taking an oath, and may be oral or by deposition, taken before such court, or before any commissioner appointed by such court, or before any disinterested State judge of the State in which the deposition is taken; and all proof of debts or other claims, by creditors entitled to prove the same under this act, shall be under oath or solemn affirmations, as aforesaid, before such court or commissioner appointed thereby, or before some disinterested State judge of the State where the creditors live, in such form as may be prescribed by the rules and regulations hereinbefore authorized to be made and established by the courts having jurisdiction in bankruptcy. But all such proofs of debts and other claims shall be open to contestation in the proper court having jurisdiction over the proceedings in the particular case in bankruptcy; and as well the assignee as the creditor shall have a right to a trial by jury upon an issue to be directed by such court, to ascertain the validity and amount of such debts or other claims; and the result therein, unless a new trial shall be granted, if in favor of the claims, shall be evidence of the validity and amount of such debts or other claims. And if any person or persons shall falsely and corruptly answer, swear or affirm, in any hearing or on trial of any matter, or in any proceeding in such court in bankruptcy, or before any commissioner, he and they shall be deemed guilty of perjury, and punishable therefor in the manner and to the extent provided by law for other cases.

§ 8. And be it further enacted, That the circuit court within and for the district where the decree of bankruptcy is passed shall have concurrent jurisdiction with the district court of the same district of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in, such assignee; and no suit at law or in equity shall, in any case, be maintainable by or against such assignee or by or against any person or persons claiming an adverse interest touching the property and rights of property aforesaid, in any court whatsoever unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued.

§ 9. And be it further enacted, That all sales, transfers and other conveyances of the assignee of the bankrupt's property and rights of property shall be made at such times and in such manner as shall be ordered and appointed by the court in bankruptcy; and all assets received by the assignee in money shall, within sixty days afterwards, be paid into the court, subject to its order respecting its future safe-keeping and disposition; and the court may require of such assignee a bond, with at least two sureties, in such sum as it may deem proper,

conditioned for the due and faithful discharge of all his duties, and his compliance with the orders and directions of the court; which bond shall be taken in the name of the United States, and shall, if there be any breach thereof, be sued and suable, under the order of such court, for the benefit of the creditors and other persons in interest.

§ 10. And be it further enacted, That in order to ensure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets and a reduction of the same to money, and a distribution thereof at as early periods as practicable, consistently with a due regard to the interests of the creditors; and a dividend and distribution of such assets as shall be collected and reduced to money, or so much thereof as can be safely disposed of, consistently with the rights and interests of third persons having adverse claims thereto, shall be made among the creditors who have proved their debts, as often as once in six months from the time of the decree declaring the bankruptcy; notice of such dividends and distribution to be given in some newspaper or newspapers in the district, designated by the court, ten days at least before the order therefor is passed; and the pendency of any suit at law or in equity, by or against such third persons, shall not postpone such division and distribution, except so far as the assets may be necessary to satisfy the same; and in all the proceedings in bankruptcy in each case shall, if practicable, be finally adjusted, settled and brought to a close by the court, within two years after the decree declaring the bankruptcy. And where any creditor shall not have proved his debt until a dividend or distribution shall have been made and declared, he shall be entitled to be paid the same amount, pro rata, out of the remaining dividends or distributions thereafter made, as the other creditors have already received, before the latter shall be entitled to any portion thereof.

§ 11. And be it further enacted, That the assignee shall have full authority, by and under the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage or other pledge, or deposit, or lien upon any property, real or personal, whether payable in present or at a future day, and to tender a due performance of the conditions thereof. And such assignee shall also have authority, by and under the order and direction of the proper court in bankruptcy, to compound any debts or other claims, or securities due or belonging to the estate of the bankrupt; but no such order or direction shall be made until notice of the application is given in some public newspaper in the district, to be designated by the court, ten days at least before the hearing, so that all creditors and other persons in interest may appear and show cause, if any they have, at the hearing, why the order or direction should not be passed.

§ 12. And be it further enacted, That if any person who shall have been discharged under this act, shall afterward become bankrupt, he shall not again be entitled to a discharge under this act, unless his estate shall produce (after all charges) sufficient to pay every cred-

itor seventy-five per cent. on the amount of the debt which shall have been allowed to each creditor.

§ 13. And be it further enacted, That the proceedings in all cases in bankruptcy shall be deemed matters of record; but the same shall not be required to be recorded at large, but shall be carefully filed, kept and numbered in the office of the said court, and a docket only, or short memorandum thereof, with the numbers, kept in a book by the clerk of the court; and the clerk of the court, for affixing his name and the seal of the court to any form, or certifying a copy thereof, when required thereto, shall be entitled to receive, as compensation, the sum of twenty-five cents, and no more. And no officer of the court, or commissioner, shall be allowed by the court more than one dollar for taking the proof of any debt or other claim of any creditor or other person against the estate of the bankrupt; but he may be allowed, in addition, his actual travel expenses for that purpose.

§ 14. And be it further enacted, That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are herein exempted; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignees shall also keep separate accounts of the joint stock or property of the company, and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignees the whole of the expenses and disbursements paid by them, the net proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock, for the payment of the joint creditors; and if there shall be any balance of the joint stock, after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective rights and interests therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts; and the certificate of discharge shall be granted or refused to each partner, as the same would or ought to be if the proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone.

§ 15. And be it further enacted, That a copy of any decree of bankruptcy, and the appointment of assignees, as directed by the third section of this act, shall be recited in every deed of lands belonging to the bankrupt, sold and conveyed by any assignees under and by virtue of this act; and that such recital, together with certified copy of such order, shall be full and complete evidence both of the bankruptcy and assignment therein recited, and supersede the necessity of any other proof of such bankruptcy and assignment to validate the said deed; and all deeds containing such recital, and supported by such proof, shall be as effectual to pass the title of the bankrupt, of, in and to, the lands therein mentioned and described, to the purchaser, as fully to all intents and purposes, as if made by such bankrupt himself immediately before such order.

§ 16. And be it further enacted, That all jurisdiction, power and authority, conferred upon and vested in the district court of the United States by this act, in cases in bankruptcy, are hereby conferred upon and vested in the circuit court of the United States for the District of Columbia, and in and upon the supreme or superior courts of any of the Territories of the United States, in cases in bankruptcy, where the bankrupt resides in the said District of Columbia, or in either of the said Territories.

§ 17. And be it further enacted, That this act shall take effect from and after the first day of February next.

Approved, August 19, 1841.

ACT OF MARCH 3, 1843.

*An Act to Repeal the Bankrupt Act.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved on the nineteenth day of August, eighteen hundred and forty-one, be, and the same is hereby repealed: Provided, That this act shall not affect any case or proceeding in bankruptcy commenced before the passage of this act, or any pains, penalties or forfeitures incurred under the said act; but every such proceeding may be continued to its final consummation in like manner as if this act had not been passed.

Approved, March 3, 1843.



# TITLE III.

## THE LAW AND PRACTICE IN BANKRUPTCY.

BANKRUPTCY ACT OF JULY 1, 1898.

(For index, see General Index, "Law of 1898," *post*.)

(Marginal figures refer to pages of this work on which pertinent decisions are noted.)

*An Act To establish a uniform system of bankruptcy throughout the United States.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

### CHAPTER I.

Bankruptcy.

#### DEFINITIONS.

Definitions.

**SECTION 1. MEANING OF WORDS AND PHRASES.**—*a* The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the

184, 205  
—"A person against whom a petition has been filed."  
—"adjudication."  
225  
—"appellate courts."  
103  
—"bankrupt."  
184  
—"clerk."  
206  
—"corporations."  
94, 205, 755  
—"court."  
94  
—"courts of bankruptcy."

- “creditor.” Indian Territory, and of Alaska; (9) “creditor” shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; **205, 316**
- “date of bankruptcy.” (10) “date of bankruptcy,” or “time of bankruptcy,” or “commencement of proceedings,” or “bankruptcy,” with reference etc. to time, shall mean the date when the petition was filed; **185**
- “debt.” “debt” shall include any debt, demand, or claim provable in bankruptcy; **205**
- “discharge.” “discharge” shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act; **225, 454**
- “document.” “document” shall include any book, deed, or instrument in writing; **207**
- “holiday.” “holiday” shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; **205**
- when deemed “insolvent.” “insolvent” shall mean a person who is deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; **225, 787**
- “judge.” “judge” shall mean a judge of a court of bankruptcy, not including the referee; **118**
- “oath.” “oath” shall include affirmation; **295**
- “officer.” “officer” shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; **205**
- “persons.” “persons” shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; **206-214**
- “petition.” “petition” shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; **207**
- “referee.” “referee” shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead;
- “conceal.” “conceal” shall include secrete, falsify, and mutilate; **225**
- “secured creditor.” “secured creditor” shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt’s assets; **844, 493**
- “States.” “States” shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; **780**
- “transfer.” “transfer” shall in-

clude the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things.

—"trustee."

—"wage-earner."  
225

Words in masculine gender.  
206

—importing, plural.

—importing, singular.  
206

## CHAPTER II.

### CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION. Courts of bankruptcy.

§ 2. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be

—U. S. district courts.  
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—supreme court, D. C.  
—Territorial courts.

Jurisdiction.

—to adjudge bankrupt.

—allow and disallow claims, etc.

—appoint receivers, etc.  
119, 755

—try and punish bankrupts, etc.  
119, 755

- hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and (19) transfer cases to other courts of bankruptcy.
- Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.
- to permit temporary transaction of business.
  - to substitute additional persons in proceedings, etc.
  - to collect and distribute assets.
  - to close estates.
  - to confirm or reject compositions.
  - to modify, etc., referees' findings.
  - determine exemptions.
  - discharge bankrupts, etc.
  - enforce orders.
  - extradite bankrupts.
  - make orders.
  - punish for contempt.
  - appoint trustees.
  - tax costs.
  - transfer cases.
  - Unspecified powers.

## CHAPTER III.

## BANKRUPTS.

Bankrupts.  
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Acts of bankruptcy.  
—of what to consist.

§ 3. ACTS OF BANKRUPTCY.—*a* Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud

his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

Petition to be filed within four months

—from when to date.  
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c It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

Defense of solvency.

—burden of proof.

d Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

Person denying insolvency.

—to testify.

—burden of proof, etc.

e Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good

Petitioner to give bond.

and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

**§ 4. WHO MAY BECOME BANKRUPTS.**—*a* Any person who owes debts, except a corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.

*b* Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.

**§ 5. PARTNERS.**—*a* A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

*b* The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

*c* The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

*d* The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

*e* The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

*f* The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied

—liability for costs, etc.

—allowance of costs, etc.

Counsel fees, etc., to be fixed by court.  
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Who may become bankrupts.

—voluntary.

—involuntary.

Partnership.  
226, 734

—administration of estate.

—jurisdiction over one partner sufficient.

—trustee's duty.

—expenses.  
226, 733

—payment of partnership debts.

—payment of individual debts.

to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

h In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

§ 6. EXEMPTIONS OF BANKRUPTS.—a This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

§ 7. DUTIES OF BANKRUPTS.—a The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first

—surplus of partnership property.

Claims of partnership against individual estates, etc.

Administration of estate where all partners are not bankrupt. 374

Exemption of bankrupts.

Duties of bankrupts specified. 543, 627 543, 555

meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

**Bankrupt, when not compelled to attend meeting.**  
543

—examine claims.

**Expenses for attending meetings.**

**Death or insanity of bankrupts.**  
569

—not to abate proceedings.  
—widow entitled to dower, etc.

**Protection and detention of bankrupts.**  
641

**Exemption from arrest.**

**Detention for purposes of examination.**

**May be kept in custody ten days, etc.**

*Provided, however,* That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

§ 8. DEATH OR INSANITY OF BANKRUPTS.—*a* The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided,* That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

§ 9. PROTECTION AND DETENTION OF BANKRUPTS.—*a* A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act.

*b* The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all



ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

§ 10. EXTRADITION OF BANKRUPTS.—*a* Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another. Extradition of bankrupts. 645

§ 11. SUITS BY AND AGAINST BANKRUPTS.—*a* A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined. Suits by and against bankrupts. 629  
—stay until adjudication.  
—further stay

*b* The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt. —appearance of trustee. 630

*c* A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him. —commenced prior to adjudication.

*d* Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed. Time for bringing suits against trustees.

§ 12. COMPOSITIONS, WHEN CONFIRMED.—*a* A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts. Compositions. 608  
—when may be offered.

*b* An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge. —application for confirming. 608

*c* A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation. —date, etc., for hearing.

*d* The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of —conditions of confirmation.

the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

—distribution  
of considera-  
tion.  
610

*c* Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

—may be set  
aside.

§ 13. COMPOSITIONS, WHEN SET ASIDE.—*a* The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

—upon prac-  
tice of fraud.

Discharges.

§ 14. DISCHARGES, WHEN GRANTED.—*a* Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

—application  
for.  
645

—hearing of  
application.  
647, 651, 685

*b* The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.

Confirmation  
discharges  
from debts.

*c* The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

Discharges,  
when revoked.  
730

§ 15. DISCHARGES, WHEN REVOKED.—*a* The judge may, upon the application of the parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

Co-debtors'  
liability not  
affected by  
bankrupt's  
discharge, etc.  
696

§ 16. CO-DEBTORS OF BANKRUPTS.—*a* The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

§ 17. DEBTS NOT AFFECTED BY A DISCHARGE.— *a* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

Debts not affected by a discharge. —U. S. and State taxes. 689  
—judgments in fraud actions, etc.  
—claims not scheduled, etc. 690  
—created by fraud, etc.

#### CHAPTER IV.

##### COURTS AND PROCEDURE THEREIN.

§ 18. PROCESS, PLEADINGS, AND ADJUDICATIONS.— *a* Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in courts of the United States.

Courts and procedure. 393  
Service of petition, involuntary bankruptcy.  
—returnable in 15 days.  
—by publication.

*b* The bankrupt, or any creditor, may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow.

Pleading within 10 days.

*c* All pleadings setting up matters of fact shall be verified under oath.

—verification.

*d* If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this Act, and makes [*sic*] the adjudication or dismiss the petition.

Court to determine issues when facts controverted.

*e* If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

Decision where pleadings not filed. 396

*f* If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none

If judge absent, case to be referred to referee. 397

have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

Hearing on  
filing volun-  
tary petition.  
—absence of  
judge.

g Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

Jury trials.  
294  
—person  
against whom  
involuntary  
petition filed,  
entitled.

§ 19. JURY TRIALS.—*a* A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

—right waived.

*b* If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

Laws as to jury  
trials appli-  
cable.

*c* The right to submit matters in controversy, or an alleged offense under this Act, to a jury shall be determined and enjoyed, except as provided by this Act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

Oaths, by  
whom admin-  
istered.

§ 20. OATHS, AFFIRMATIONS.—*a* Oaths required by this Act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

Affirmations.  
295, 845

*b* Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

Evidence.  
Compulsory  
attendance of  
witnesses.  
200

§ 21. EVIDENCE.—*a* A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the State in which the proceedings are pending, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act.

Depositions,  
laws govern-  
ing.

*b* The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States

laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

*c* Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt. —notice of taking.

*d* Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence. Certified copies of proceedings, evidence.

*e* A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened. —of order approving trustee's bond. 198, 427

*f* A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made. —of order confirming composition, etc. 198

*g* A certified copy of an order confirming a composition shall constitute evidence of the re-vesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart. —evidence of reinvesting title in bankrupt.

§ 22. REFERENCE OF CASES AFTER ADJUDICATION.—*a* After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district. Reference of cases after adjudication. 196

*b* The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another. Transfer of case to different referee.

§ 23. JURISDICTION OF UNITED STATES AND STATE COURTS.—*a* The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. Jurisdiction of United States and State courts. —circuit courts. 104

Suits by trustees, where brought.

*b* Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

Concurrent jurisdiction in circuit courts and courts of bankruptcy.

104

Appellate courts, jurisdiction of.

170

*c* The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act.

§ 24. JURISDICTION OF APPELLATE COURTS.—*a* The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

—appeals from courts not in organized circuits and in District of Columbia.

Jurisdiction of circuit court of appeals.

*b* The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

Appeals.

161

—when taken.

§ 25. APPEALS AND WRITS OF ERROR.—*a* That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

—to be within 10 days.

—hearing.

Appeal to U. S. Supreme Court.

162

*b* From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

—where amount exceeds \$2,000, etc.

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

—where question certified by Supreme Court Justice.

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the

question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States.

c Trustees shall not be required to give bond when they take appeals or sue out writs of error. —trustees not to give bond.

d Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted. —certification to Supreme Court by courts 170

§ 26. ARBITRATION OF CONTROVERSIES.—a The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate. Arbitration of controversies. —trustees may submit to.

b Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator. Selection of arbitrators.

c The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury. Findings of arbitrators. 443

§ 27. COMPROMISES.—a The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate. Compromises by trustee. 443

§ 28. DESIGNATION OF NEWSPAPERS.—a Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published. Designation of newspapers to publish notices. 317

§ 29. OFFENSES.—a A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee. Penalty. 347

b A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally —concealing property.

—false oath or account, etc. —presenting false claim.

—receiving property from bankrupt.  
—extorting money for forbearing to act, etc.

or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

c A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

d A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

United States Supreme Court to make rules, etc. 851

§ 30. RULES, FORMS, AND ORDERS.—a All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

Computation of time. 291

§ 31. COMPUTATION OF TIME.—a Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

Transfer of cases commenced in different courts. 291

§ 32. TRANSFER OF CASES.—a In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

## CHAPTER V.

Officers.

### OFFICERS, THEIR DUTIES AND COMPENSATION.

Offices of referee and trustee created. 187

§ 33. CREATION OF TWO OFFICES.—a The offices of referee and trustee are hereby created.

Referees, appointment, etc. 188

§ 34. APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES.—a Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees,



each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

§ 35. QUALIFICATIONS OF REFEREES.—*a* Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

§ 36. OATHS OF OFFICE OF REFEREES.—*a* Referees shall take the same oath of office as that prescribed for judges of United States courts.

§ 37. NUMBER OF REFEREES.—*a* Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

§ 38. JURISDICTION OF REFEREES.—*a* Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a com-

—designation  
of districts.

—qualifica-  
tions.  
188

—to take oath.  
189

—number of  
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Jurisdiction of  
referees.  
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—to consider  
petitions.

—administer  
oaths, exam-  
ine witnesses,  
etc.

—take posses-  
sion and re-  
lease property,  
etc.

—perform cer-  
tain duties of  
bankruptcy  
courts.

—authorize  
employment  
of stenogra-  
phers.

pensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

**Referees' duties.**  
—declare dividends.  
**191, 600**  
—examine schedules, etc.

—furnish information, etc.

—give notices.  
**191, 600**  
—prepare records, etc.  
**191**

—prepare schedules, etc.

—preserve records, etc.

—transmit papers to clerks, etc.

—preserve evidence, etc.

—obtain papers, etc.  
**191**

—not to act if interested.

**Compensation of referees.**  
**201, 766**

—on transfer from one to another.  
**200, 766**

§ 39. DUTIES OF REFEREES.—*a* Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

*b* Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

§ 40. COMPENSATION OF REFEREES.—*a* Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

*b* Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

*c* In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee. —where reference revoked.

§ 41. CONTEMPTS BEFORE REFEREES.— *a* A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him. Contempt before referees. 195

*b* The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court. When witness not required to attend. Contempt proceedings. —penalty.

§ 42. RECORDS OF REFEREES.— *a* The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States. Records of referees. —manner of keeping. 196

*b* A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

*c* The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

§ 43. REFEREE'S ABSENCE OR DISABILITY.— *a* Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy. Referee's absence or disability. —filling vacancy. 195

§ 44. APPOINTMENT OF TRUSTEES.— *a* The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in Trustees. 190

—appoint-  
ment.

the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

—qualifica-  
tions.  
320

§ 45. QUALIFICATIONS OF TRUSTEES.—*a* Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

—death or re-  
moval.  
332  
—suits not to  
abate, etc.  
427

§ 46. DEATH OR REMOVAL OF TRUSTEES.—*a* The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

—duties speci-  
fied.  
413  
578

§ 47. DUTIES OF TRUSTEES.—*a* Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

—concurrence  
of two out of  
three neces-  
sary.  
414

*b* Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

§ 48. COMPENSATION OF TRUSTEES.—*a* Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars.

Trustees' compensation.

—fee.  
585, 766

—commissions.  
585, 766

*b* In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

—apportionment where more than one.

*c* The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

—withholding of.

§ 49. ACCOUNTS AND PAPERS OF TRUSTEES.—*a* The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

Trustees' accounts and papers.  
589

§ 50. BONDS OF REFEREES AND TRUSTEES.—*a* Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

Bonds of referees.  
189

*b* Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

—of trustees.  
331

*c* The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

—of new trustee, etc.

—amount may be increased.

*d* The court shall require evidence as to the actual value of the property of sureties.

Surety's property, value.  
331

*e* There shall be at least two sureties upon each bond.

—two necessary.

—excess of  
property.

*f* The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

—corporations may be.

*g* Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

Filing of  
bonds.

*h* Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

Bond, trustee's liability.

*i* Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees.

—joint.

*j* Joint trustees may give joint or several bonds.

—failure to  
give creates  
vacancy.

*k* If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

—suits upon  
referees'.

*l* Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

—suits upon  
trustees'.

*m* Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

Clerks' duties.

767  
—to account.

§ 51. DUTIES OF CLERKS.—*a* Clerks shall respectively: (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

—collect fees,  
etc.  
767

—deliver  
papers to  
referee, etc.

—pay referee.

Compensation  
of clerks.  
767

§ 52. COMPENSATION OF CLERKS AND MARSHALS.—*a* Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

—of marshals.  
767

*b* Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise

provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

§ 53. DUTIES OF ATTORNEY-GENERAL.—*a* The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important. Attorney-General to report annually. 777

§ 54. STATISTICS OF BANKRUPTCY PROCEEDINGS.—*a* Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so. —statistical information for. 777

## CHAPTER VI.

### CREDITORS.

### Creditors.

§ 55. MEETINGS OF CREDITORS.—*a* The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held. —place and time of meeting. 318, 571

*b* At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor. —presiding officer, duties. 318, 571

*c* The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act. Creditors' duty. 571

*d* A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place. —subsequent meetings of. 571

—call of meeting by court.  
571

*e* The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

—final meeting.  
572

*f* Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

Voting at creditors' meetings.  
492

§ 56. VOTERS AT MEETINGS OF CREDITORS.—*a* Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

—holders of secured claims, not entitled, etc.

*b* Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

Proof of claims.—of what to consist.  
529

§ 57. PROOF AND ALLOWANCE OF CLAIMS.—*a* Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

—when founded upon a writing.  
548

*b* Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

—after proved, may be filed.  
555

*c* Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

—allowance of claims, etc.

*d* Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

Claims of secured creditors, etc.  
493

*e* Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed



for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

*f* Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit. Claims, hearing objections. 542, 548

*g* The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences. Preferred claims. 550

*h* The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. Value of securities held by secured creditors, etc. 493

*i* Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor. Claims secured by individual undertaking. 477

*j* Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law. Debts due the United States, allowance of. 528

*k* Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed. Reconsideration of claims. 542

*l* Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part. —recovery of dividend. 543

*m* The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors. Claims of one bankrupt against another. 528

*n* Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: Time for proving claims. *Provided*, That the right of infants and insane persons without —of infants, etc.

guardians, without notice of the proceedings, may continue six months longer.

Notice to  
creditors.  
316

—unless  
waived, etc.  
316

—of first  
meeting.

—other  
notices.

—to referee.

Petition, who  
may file.  
207

—as voluntary  
bankrupt.

—involuntary.

—to be in  
duplicate.

Notice to cred-  
itors not  
joined in  
petition.

—hearing of  
case, etc.

—when dis-  
missed.

§ 58. NOTICES TO CREDITORS.—*a* Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy, and (8) the proposed dismissal of the proceedings.

*b* Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

*c* All notices shall be given by the referee, unless otherwise ordered by the judge.

§ 59. WHO MAY FILE AND DISMISS PETITIONS.—*a* Any qualified person may file a petition to be adjudged a voluntary bankrupt.

*b* Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

*c* Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

*d* If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard: if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

*e* In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

*f* Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

*g* A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.

§ 60. PREFERRED CREDITORS.—*a* A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

*b* If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

*c* If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

*d* If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

## CHAPTER VII.

### ESTATES.

### Estates.

§ 61. DEPOSITORIES FOR MONEY.—*a* Courts of bankruptcy shall designate, by order, banking institutions as depositories for

- the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.
- Expenses of administering estates.**  
**787**
- § 62. EXPENSES OF ADMINISTERING ESTATES.—*a* The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.
- report and approval.**
- Debts proved.**  
**586**
- fixed liability.**  
**586**
- § 63. DEBTS WHICH MAY BE PROVED.—*a* Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.
- costs of suit due, etc.**
- costs incurred before filing petition.**
- on open account.**
- judgments, etc.**
- Allowance of unliquidated claims.**  
**587**
- Debts having priority.**
- taxes.**
- order of payment.**  
**591**
- cost of preserving estate.**
- filing fees.**
- b* Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.
- § 64. DEBTS WHICH HAVE PRIORITY.—*a* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.
- b* The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees

paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

—cost of administration, etc.

—wages of workmen, etc.

—owing to person entitled to priority, etc.

c In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

Payment of claims accruing after composition, when discharge revoked, etc.

§ 65. DECLARATION AND PAYMENT OF DIVIDENDS.—a Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

Dividends.  
—on allowed claims.  
577

b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order.

—declaration of first.

c The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

—creditors receiving, not affected by proof of subsequent claims, etc.  
579

d Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the

—preference of certain creditors.

United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts.

Limit to claimant's right to collect.  
600

*c* A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act.

Unclaimed dividends.  
—after six months paid into court.

§ 66. UNCLAIMED DIVIDENDS.— *a* Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

—after 1 year, distributed.

*b* Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

—of minors.  
601

Liens.  
—unrecorded claims not.

§ 67. LIENS.— *a* Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

—trustee subrogated to rights of creditor.  
825

*b* Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

Lien, judgment, etc., created within 4 months, to be dissolved.

*c* A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

—if defendant were insolvent.

—knowledge of.

—through fraud.

—trustee subrogated, etc.  
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Liens given in good faith, etc.

*d* Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record

thereof was necessary in order to impart notice, shall not be affected by this Act.

*c* That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.

Conveyances, etc., subsequent to act and within 4 months of petition. 526

—to defraud, etc., void.

—property remains part of assets.

Conveyances, etc., within 4 months of petition.

—void under State laws.

—void under this act.

*f* That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

Liens, etc., created through legal proceedings. 526

—void, etc.

—property passes to trustee.

Court may order conveyances.

Purchaser for value.

§ 68. SET-OFFS AND COUNTERCLAIMS.—*a* In all cases of mutual debts or mutual credits between the estate of a bankrupt

Set-offs and counterclaims. 483

- and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.
- allowed.
  - not allowed.
- 483** *b* A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.
- Possession of property.**  
**229** § 69. POSSESSION OF PROPERTY.—*a* A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.
- when bankrupts may be seized.
- bond to indemnify.
- released on giving bond.
- Title to property.**  
**393** § 70. TITLE TO PROPERTY.—*a* The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trademarks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the
- documents.
  - patents, etc.
  - certain powers.
  - transferred in fraud.
  - which might have been transferred, etc.
  - policy of insurance.



bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property. —rights of action upon contracts. 454

*b* All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value. Appraisal of property. 393

*c* The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee. —sale. Trustee to convey title.

*d* Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge. —vesting title on. —setting composition aside. 393

*e* The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. —may avoid certain transfers, etc. —recovery of property.

*f* Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him. Title reverted on confirming composition.

THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.

§ 71. *a* This Act shall go into full force and effect upon its passage: *Provided, however,* That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof. Force and effect. 351 —petition for voluntary bankruptcy. —involuntary.

*b* Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it. Cases pending under State laws. 97

Approved, July 1, 1898.

**TITLE IV.**  
**THE LAW AND PRACTICE IN BANKRUPTCY**  
**ANNOTATED.**

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THE CONSTITUTION OF THE UNITED STATES.

THE ACT OF JULY 1, 1898.

THE ACT OF MARCH 2, 1867, AND AMENDMENTS.

[The section numbers of the law of 1867 refer to sections in the  
Revised Statutes of the United States.]

CONSTITUTION OF THE UNITED STATES.

ART. I, SEC. 8.—“The Congress shall have power \* \* \* to establish \* \* \* uniform laws on the subject of bankruptcies throughout the United States.”

**Extent of the power.**—The subject is divisible in its nature into bankruptcy and insolvent laws, though the line of partition between them is not so distinctly marked as to enable any person to say with positive precision what belongs exclusively to one and not to the other class of laws. The difficulty of discriminating with any accuracy between insolvent and bankruptcy laws would lead to the opinion that a bankruptcy law may contain those regulations which are generally found in insolvent laws, and that an insolvent law may contain those which are common to a bankruptcy law. *Sturgis v. Crowninshield*, 4 Wheat. 122.

The word bankruptcy is employed in the Constitution in the plural and as part of an expression “the subject of bankruptcies.” The ideas attached to the word in this connection are numerous and complicated. They form a subject of extensive and complicated legislation. Of this subject Congress has general jurisdiction. In *re Edward Klein*, 1 How. 277, note; s. c. 2 N. Y. Leg. Obs. 185; in *re Silverman*, 4 B. R. 523; s. c. 1 Saw. 410; s. c. 2 Abb. C. C. 243.

Bankruptcy bears a meaning co-extensive with insolvency, and is equivalent to that word in the Constitution. *Kunzler v. Kohaus*, 5 Hill. 317; *Sackett v. Andross*, 5 Hill. 327; *Morse v. Hovey*, 1 Barb. Ch. 404; s. c. 1 Sandf. Ch. 187.

The grant is a grant of plenary power over the “subject of bankruptcies.” The subject of bankruptcies includes the distribution of the property of the fraudulent or insolvent debtor among his creditors, and the discharge of the debtor from his contracts and legal liabilities, as well as all the intermediate and incidental matters tending to the accomplishment

or promotion of these two principal ends. Congress is given full power over this subject, with the one qualification, that its laws thereon shall be uniform throughout the United States. In *re Silverman*, 4 B. R. 523; s. c. 1 Saw. 410; s. c. 2 Abb. C. C. 243; in *re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.

The power of Congress extends to all cases where the law causes the property of a debtor to be distributed among his creditors. This is its least limit. Its greatest is a discharge of the debtor from his contracts. All intermediate legislation affecting substance and form, but tending to further the great end of the subject — distribution and discharge — is in the competency and discretion of Congress. In *re Edward Klein*, 1 How. 277, note; s. c. 2 N. Y. Leg. Obs. 185; in *re Silverman*, 4 B. R. 523; s. c. 1 Saw. 410; s. c. 2 Abb. C. C. 243.

To this power there is no limitation, and consequently it is competent to Congress to act on the whole subject of bankruptcy with a plenary discretion. In *re Irwine*, 1 Penn. L. J. 291.

The power conferred is without restriction, save in its uniformity. It is plenary, and in reference to its subject may be exercised with the same latitude as the like power has been and may be by the British Parliament. *Kunzler v. Kohaus*, 5 Hill, 317; in *re Edward Klein*, 1 How. 277, note; s. c. 2 N. Y. Leg. Obs. 185.

Congress in passing laws on the subject of bankruptcies is not restricted to laws with such scope only as the English bankruptcy laws had when the Constitution was adopted. The power is general, unlimited, and unrestricted over the subject. In *re Silverman*, 4 B. R. 523; s. c. 1 Saw. 410; s. c. 2 Abb. C. C. 243; in *re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562; *Thompson v. Alger*, 53 Mass. 428.

The framers of the Constitution did not intend to limit the power to any particular class of persons. *Morse v. Hovey*, 1 Sandf. Ch. 187; s. c. 1 Barb. Ch. 404; in *re Edward Klein*, 1 How. 277, note; s. c. 2 N. Y. Leg. Obs. 185; *Kunzler v. Kohaus*, 5 Hill, 317; in *re California Pacific R. R. Co.*, 11 B. R. 103; s. c. 3 Saw. 240; in *re Silverman*, 4 B. R. 523; s. c. 1 Saw. 410; s. c. 2 Abb. C. C. 243.

It is not necessary that a bankruptcy law shall provide for the debtor's discharge. In *re California Pacific R. R. Co.*, 11 B. R. 103; s. c. 3 Saw. 240.

Congress may establish a system of voluntary as well as involuntary bankruptcy. *Loud v. Pierce*, 25 Me. 233; *Lalor v. Wattles*, 8 Ill. 225; *Kunzler v. Kohaus*, 5 Hill, 317; in *re Edward Klein*, 1 How. 277, note; s. c. 2 N. Y. Leg. Obs. 185; *Morse v. Hovey*, 1 Sandf. Ch. 187; s. c. 1 Barb. Ch. 404; *Thompson v. Alger*, 53 Mass. 428; *State Bank v. Wilborn*, 6 Ark. 35; *Keene v. Mould*, 16 Ohio, 12; *Cutter v. Folsom*, 17 N. H. 139; *McCormick v. Pickering*, 4 N. Y. 276; *Rowan v. Holcomb*, 16 Ohio, 463; *Dresser v. Brooks*, 3 Barb. 420; *Hastings v. Fowler*, 2 Ind. 216; *Reed v. Vaughan*, 15 Mo. 137; in *re Irwine*, 1 Penn. L. J. 291.

The directly granted power over bankruptcies carries the incidental authority to modify the obligation of contracts so far as the modification may result from a legitimate exercise of the delegated power. A discharge may therefore be granted releasing the debtor from contract subsisting at

the time when the law was passed. *Kunzler v. Kohaus*, 5 Hill, 317; *Sackett v. Andross*, 5 Hill, 327; in *re Edward Klein*, 1 How. 277, note; s. c. 2 N. Y. Leg. Obs. 185; *Morse v. Hovey*, 1 Sandf. Ch. 187; s. c. 1 Barb. Ch. 404; *Loud v. Pierce*, 25 Me. 233; *Keene v. Mould*, 16 Ohio, 12; *McCormick v. Pickering*, 4 N. Y. 276; in *re Irwine*, 1 Penn. L. J. 291.

Congress may pass a law which will have the effect to make void an assignment which is valid under the State laws. In *re Henry Brenne-man*, Crabbe, 456.

The power to enact a bankruptcy law implies the power to make it efficient. The end implies the means. *Russell v. Cheatham*, 16 Miss. 703.

Congress has the power not only to establish uniform laws on the subject of bankruptcies, but also to commit the execution of the system to such Federal courts as it may see fit, and to prescribe such modes of procedure, and means of administering the system as it may deem best suited to carry the law into successful operation. *Shearman v. Bingham*, 5 B. R. 34; s. c. 7 B. R. 490; s. c. 3 C. L. N. 258; *Goodall v. Tuttle*, 7 B. R. 193; s. c. 3 Biss. 219; *Mitchell v. Manuf. Co.* 2 Story, 648.

Congress has the power to define what and how much of the debtor's property shall be exempt from the claims of his creditors. In *re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.

To come within the constitutional provision, a bankruptcy law must be a uniform law throughout the United States. A law which prescribes one rule in one district and a different one in another can not be regarded as a uniform law. *Kittredge v. Warren*, 14 N. H. 509.

The laws established by Congress on the subject of bankruptcies under the power conferred by the Constitution, must, indeed, be uniform throughout the United States. But the extent to which this power shall be exercised rests in the discretion of Congress. Uniformity is required in the national legislation only, and the laws of the several States may be left in force so long and to such extent as Congress may see fit. *Day v. Bardwell*, 3 B. R. 455; s. c. 97 Mass. 246.

**State Insolvent Laws.**—The power granted by Congress may be exercised or declined as the wisdom of that body shall decide. If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist or that State legislation on the subject must cease. It is not the mere existence of the power, but its exercise which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment which is inconsistent with the partial acts of the States. *Sturgis v. Crowninshield*, 4 Wheat. 122; *Blanchard v. Russell*, 13 Mass. 1; *Farmers' Bank v. Smith*, 3 S. & R. 63; *Betts v. Bagley*, 29 Mass. 572; *Adams v. Storey*, 1 Paine, 79; *Pugh v. Russel*, 2 Blackf. 294; *Alexander v. Gibson*, 1 N. & McC. 480. Contra, *Vanuxem v. Hazellhursts*, 4 N. J. 192; *Oldens v. Hallet*, 5 N. J. 466; *Golden v. Prince*, 3 Wash. 313; *Mason v. Nash*, 1 Breese, 16; *Ballantine v. Haight*, 16 N. J. 196.

One prominent reason why the power was given to Congress was to secure to the people of the United States, as one people, a uniform law by which a debtor might be discharged from his previous engagements, and his future acquisitions exempted from his previous engagements. The rights of debtor and creditor equally entered into the minds of the framers of the Constitution. The great object was to deprive the States of the dangerous power to abolish debts. In *re* Edward Klein, 1 How. 277, note; s. c. 2 N. Y. Leg. Obs. 185.

The peculiar terms of the grant deserve notice. Congress is not authorized merely to pass laws the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States. This establishment of uniformity is perhaps incompatible with State legislation on that part of the subject to which the acts of Congress may extend. *Sturgis v. Crowninshield*, 4 Wheat. 122.

The right of the States to pass a bankruptcy law is not extinguished but merely suspended by the enactment of a general bankruptcy law. The repeal of that law can not confer the power on the States, but it removes a disability to its exercise, which was created by the act of Congress. *Ibid*.

The bankruptcy act, as soon as it took effect, *ipso facto*, suspended all action upon future cases arising under the insolvent laws of the State, where the insolvent laws act upon the same subject-matter and the same persons as the bankruptcy act; and all proceedings upon such cases commenced under the State laws after that time are null and void. *Commonwealth v. O'Hara*, 1 B. R. 86; s. c. 6 Phila. 402; s. c. 6 A. L. Reg. 765; *Perry v. Langley*, 1 B. R. 559; s. c. 1 L. T. B. 34; s. c. 7 A. L. Reg. 429; *Van Nostrand v. Carr*, 2 B. R. 485; s. c. 30 Md. 128; *Martin v. Berry*, 2 B. R. 629; s. c. 37 Cal. 208; s. c. 2 L. T. B. 180; *Corner v. Miller et al.*, 1 B. R. 403; *Shears v. Solhinger*, 10 Abb. Pr. (N. S.) 287; in *re* Reynolds, 9 B. R. 50; s. c. 8 R. I. 485; in *re* Lucius Eames, 2 Story, 322; *Bishop v. Loewen*, 2 Penn. L. J. 364; *Griswold v. Pratt*, 49 Mass. 16; *Rowe v. Page*, 13 B. R. 366; s. c. 54 N. H. 190.

The State insolvent laws are not entirely abrogated. They exist and operate with full vigor until the bankruptcy law attaches upon the person and property of the debtor. In *re* John Ziegenfuss, 2 Ired. 463; *Reed v. Taylor*, 4 B. R. 710; s. c. 32 Iowa, 209.

Two statutes having the same general object, and acting upon the same persons and the same cases, by different modes and in different jurisdictions, must be in conflict with each other. Though the modes by which the remedy is administered may vary, yet, where the bankruptcy act and the State insolvent law have substantially the same scope and object, and act upon the same persons and cases, the State insolvent law is suspended. The act of Congress is both a bankruptcy act and an insolvent act. *Martin v. Berry*, 2 B. R. 629; s. c. 37 Cal. 208; s. c. 2 L. T. B. 180; *Van Nostrand v. Carr*, 2 B. R. 485; s. c. 30 Md. 128.

The jurisdiction of the bankruptcy act does not depend upon the right of the debtor to ultimately obtain a discharge. If his case comes within the provisions of the bankruptcy act, he can not obtain a discharge under

the State insolvent law, even though his assets are not sufficient to pay thirty per centum on the claims that may be proved against his estate. *Van Nostrand v. Carr*, 2 B. R. 485; s. c. 30 Md. 128.

If the debtor has not committed an act of bankruptcy, and declines to go into voluntary bankruptcy, a creditor may proceed against him under the State insolvent law, where such proceedings are in harmony with the purpose of the bankruptcy law, for the State insolvent law remains in full force in respect to all persons and matters over which the bankruptcy law declines to take jurisdiction. *Geery's Appeal*, 43 Conn. 289.

The State insolvent laws were not suspended until the 1st day of June, 1867. *Augsbury v. Crossman*, 17 N. Y. Supr. 387.

**State Insolvency Laws.**— ACT OF 1898, CH. 7, SEC. 71. \* \* \*  
*b* Proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it.

**Jurisdiction.**— If a State court has acquired jurisdiction, under a State law, of a case in insolvency, and is engaged in settling the debts and distributing the assets of the insolvent before or at the date at which the act of Congress upon the same subject takes effect, the State court may, nevertheless, proceed with the case to its final conclusion, and its action in the matter will be as valid as if no law upon the subject had been passed by Congress. *Martin v. Berry*, 2 B. R. 629; s. c. 37 Cal. 308; s. c. 2 L. T. B. 180; *Meekins, Kelly & Co. v. Creditors*, 3 B. R. 511; s. c. 19 La. An. 497; in re *Ell Horton*, 5 Law Rep. 462; in re *Bela Judd*, 5 Law Rep. 328; *West v. Creditors*, 5 Rob. (La.) 261; s. c. 8 Rob. (La.) 123; *Dwight v. Simon*, 4 La. An. 490; *Larrabee v. Talbot*, 5 Gill, 426; *Lavender v. Gosnell*, 12 B. R. 282; s. c. 43 Md. 153; *Longis v. Creditors*, 20 La. An. 15.

If the debtor was divested of his property under the State insolvent law at the time of the adoption of the bankruptcy law, the jurisdiction of the State court is not affected thereby. *Judd v. Ives*, 45 Mass. 401.

All proceedings on a petition to compel an insolvent debtor to surrender his property, which are pending at the time when the proceedings in bankruptcy were commenced, should be stayed until an assignee is appointed. *West v. Creditors*, 4 Rob. (La.) 88; s. c. 8 Rob. (La.) 123.

The jurisdiction of the State court attaches from the moment when it makes the order staying the creditors from all interference with the property of the debtor. From that time the State court has the legal custody and control of his estate. *Martin v. Berry*, 2 B. R. 629; s. c. 37 Cal. 208; s. c. 2 L. T. B. 180; *Meekins, Kelly & Co. v. Creditors*, 3 B. R. 511; s. c. 19 La. An. 497.

A suit to compel a new surrender is a new suit, and not a continuation of the suit in insolvency previously pending. The suspension of the State insolvent law by the enactment of the bankruptcy law before the surrender was ordered, divested the State court of its jurisdiction over cases previously instituted, and no further proceedings can be had therein. *Fisk v. Montgomery*, 21 La. An. 446.

The State laws relating to insolvent corporations were superseded. The State courts have jurisdiction as far as the forfeiture of the charter of a corporation for insolvency is concerned; but with the decree of forfeiture their jurisdiction ends. They can not go on and administer upon the property of a corporation as the property of an insolvent corporation, for the insolvent laws of a State touching corporations are no longer in force. *Thornhill et al. v. Bank of Louisiana et al.*, 3 B. R. 435; s. c. 5 B. R. 367; s. c. 1 Woods, 11; s. c. 1 L. T. B. 156; s. c. 3 L. T. B. 38; in re Merchants' Ins. Co., 6 B. R. 43; s. c. 3 Bliss, 162; s. c. 2 L. T. B. 243.

The treatment which a corporation may receive at the hands of the State court can not avail to sustain that court's control over the assets. If the fact of insolvency exists, and the corporation is within the provisions of the bankruptcy law, the Federal courts sitting in bankruptcy have exclusive jurisdiction of the property, and the fact that a State law does not purport or attempt to relieve the debtor from his debts can not be urged as a reason why the State court should hold the assets and administer them after proper proceedings in bankruptcy have been instituted in the Federal courts. So far as a State law attempts to administer on the effects of an insolvent debtor, and distribute them among creditors, it is, to all intents and purposes, an insolvent law, although it may not authorize the discharge of the debtor from further liability. If the fact of insolvency does not exist, the State court may probably have the right to administer the assets as an incident to a proceeding for the dissolution of the corporation, but when insolvency intervenes so as to make the debtor a proper subject for the operation of the bankruptcy law, the exclusive jurisdiction of the bankruptcy court attaches, and the State court, and those acting under its mandates, must surrender the control of the assets, whatever may be the final decree in regard to the continuance of the corporation. In re Merchants' Ins. Co., 6 B. R. 43; s. c. 3 Bliss, 162; s. c. 2 L. T. B. 243; *Thornhill et al. v. Bank of Louisiana et al.*, 3 B. R. 435; s. c. 5 B. R. 367; s. c. 1 Woods, 11; s. c. 1 L. T. B. 156; s. c. 3 L. T. B. 38; in re Independent Ins. Co., 6 B. R. 169, 260; s. c. 1 Holmes, 103; *Platt v. Archer*, 6 B. R. 465; s. c. 9 Blatch, 559; *Shryock v. Bashore*, 13 B. R. 481; s. c. 15 B. R. 283; s. c. 82 Penn. 159.

A proceeding in bankruptcy is not the exclusive method of winding up insolvent corporations. The bankruptcy act does not ipso facto suspend State laws for the collection of debts. *Chandler v. Siddle*, 10 B. R. 236; s. c. 3 Dillon, 477.

A State law to abolish imprisonment on civil process in certain cases, which is limited to the single instance of involuntary confinement, and whose aim and purpose is simply to liberate the person, is not superseded. *Steelman v. Mattix*, 36 N. J. 344; *Shears v. Solhinger*, 10 Abb. Pr. (N. S.) 287; in re Reynolds, 9 B. R. 50; s. c. 8 R. I. 485; *Jordan v. Hall*, 9 R. I. 218; in re Rank, Crabbe, 493.

If the distribution of the property is merely incidental to the release of the person from imprisonment, and the debt is not discharged, the proceeding is not a proceeding in bankruptcy. *Steelman v. Mattix*, 36 N. J. 344.

The bankruptcy act can not affect the determination of a debtor's right to be discharged by taking the poor debtor's oath, and of his liability to imprisonment by way of punishment for fraud, upon proceedings which were commenced before the act took effect. *Stockwell v. Silloway*, 100 Mass. 287.

In an action on a bond given on the arrest of the debtor, and conditioned that he will apply for the benefit of the State insolvent laws, a plea that he has since obtained a discharge under the bankruptcy law is a valid plea, unless the debt is one that is not released by a discharge. *Hubert v. Horter*, 14 B. R. 430; s. c. 24 Pitts. L. J. 19; *Barber v. Rogers*, 71 Penn. 362; *Nesbit v. Greaves*, 6 W. & S. 120.

A bond to apply for the benefit of the State insolvent laws, and if he fails to be discharged to surrender himself to the sheriff is valid. The undertaking is in the alternative, either to obtain a discharge or to return to the condition from which he was released. If he can not apply for the benefit of the State insolvent laws because they are suspended, he must perform the other alternative of the condition. *Steelman v. Mattix*, 36 N. J. 344.

A State insolvent law which merely protects the person from imprisonment, without affecting contracts, is not superseded, although it also provides for the distribution of the debtor's property. *Sullivan v. Hieskill*, *Crabbe*, 525; s. c. 4 Penn. L. J. 171.

A State law providing for the arrest and punishment of fraudulent debtors is not suspended by the bankruptcy law. *Scully v. Kirkpatrick*, 79 Penn. 324.

The bankruptcy law does not supersede the State laws relating to the settlement of the insolvent estate of lunatics, spendthrifts, or deceased persons. *Hawkins v. Learned*, 54 N. H. 333.

A State law which makes a transfer by an insolvent with intent to give a preference operate as an assignment for the benefit of all creditors is not an insolvent law, and is not superseded by the bankruptcy law. *Ebersole v. Adams*, 13 B. R. 141; s. c. 10 Bush, 83; *Linthicum v. Fenley*, 11 Bush, 131.

The bankruptcy law does not supersede a State law regulating assignments for the benefit of creditors. *Mayer v. Hillman*, 13 B. R. 440; s. c. 91 U. S. 496; in re *Hawkins et al.*, 2 B. R. 378; s. c. 34 Conn. 548; *Beck v. Parker*, 65 Penn. 262; *Maltbie v. Hotchkiss*, 5 B. R. 485; s. c. 38 Conn. 80.

A State law which provides a mode of apportioning the losses of a savings bank among the depositors is valid, although it was passed while the bankruptcy law was in force. *Simpson v. Savings Bank*, 15 B. R. 385; s. c. 56 N. H. 466.

A provision in State law which prohibits an insolvent corporation from transferring its property with the intention to give a preference is superseded. *French v. O'Brien*, 52 How. Pr. 394.

An act which provides for the arrest of a debtor who removes or disposes of his property with the intent to defraud his creditors is not superseded. *Gregg v. Hilsen*, 34 Leg. Int. 20.



The law allowing assignments for the benefit of creditors is not a part of the insolvent laws, and is not superseded by the bankruptcy law. *Cook v. Rogers*, 13 B. R. 97; s. c. 31 Mich. 391; s. c. 14 A. L. Reg. 633; *Van Helm v. Elkus*, 15 B. R. 195; s. c. 15 N. Y. Supr. 516.

An assignment made as a part of the machinery of a State insolvent law, and deriving all its validity and efficacy from the statute is void. *Shryock v. Bashore*, 13 B. R. 481; s. c. 15 B. R. 283; s. c. 82 Penn. 159; *Rowe v. Page*, 13 B. R. 366; s. c. 54 N. H. 190.

Whether an assignment in proceedings under a State insolvent law is void, is a question that may be raised in a collateral action. *Shryock v. Bashore*, 13 B. R. 481; s. c. 15 B. R. 283; s. c. 82 Penn. 158.

The insolvent laws are no further suspended than they seek upon notorious grounds to seize and distribute the effects of the debtor among his creditors generally. A statute for the more effectual appropriation of a debtor's property to satisfy an individual debt is not suspended. *Berthelou v. Betts*, 4 Hill, 577.

The State insolvent laws were not suspended until June 1, 1867. *Day v. Bardwell et al.*, 3 B. R. 455; s. c. 97 Mass. 246; *Martin v. Berry*, 2 B. R. 629; s. c. 37 Cal. 208; s. c. 2 L. T. B. 180; *Chamberlain v. Perkins*, 51 N. H. 336.

The State laws are operative to some extent and for some purposes. They are clearly operative in all cases which are not within the provisions of the bankruptcy law. *Shepardson's Appeal*, 36 Conn. 23; *Clarke v. Ray*, 1 H. & J. 318; *in re Winternitz*, 4 B. R. (quarto) 127; s. c. 18 Pitts. L. J. 61.

The bankruptcy law applies only to cases where the debtor owes debts provable under the act exceeding the amount of three hundred dollars. When the debts do not exceed that amount, the case is not within the purview of the act. Before proceedings under the State law can be held to be erroneous, it must affirmatively appear that the debts are more than that amount. Until then, there is no conflict of laws, and courts will not presume that the debts are more or less than that amount. *Shepardson's Appeal*, 36 Conn. 23.

The State insolvent laws are still in force so far as they affect debts that will not be released by a discharge under the bankruptcy act, such as debts created by the fraud of the bankrupt. Where the bankruptcy act expressly excepts a class of cases, it must have been the intention of Congress not to interfere, in such specified class, with the laws of the several States. A party imprisoned under a judgment founded upon a fraudulent debt, may take the benefit of the State insolvent laws for the purpose of obtaining a release and discharge from that debt. *in re Winternitz*, 4 B. R. (quarto) 127; s. c. 18 Pitts. L. J. 61; *Stapp v. Stahl*, 2 W. N. 80.

The State insolvent laws are suspended even as between citizens of the same State. *Cassard et al. v. Kroner*, 4 B. R. 569.

An attachment law which permits a writ of attachment to issue for the causes which would be sufficient to authorize the institution of proceedings in involuntary bankruptcy, and authorizes the distribution of the property equally among all the creditors, is superseded. *Tobin v. Trump*, 3 Brewst. 288; s. c. 7 Phila. 123.

Whether a State insolvent law is unconstitutional, is a question that can not be raised by the defendant in an action by an insolvent trustee to recover a debt due to the estate. *Shryock v. Bashore*, 13 B. R. 48; s. c. 15 B. R. 283; s. c. 82 Penn. 159.

There is a material distinction between discharging a debtor and distributing his assets among his creditors. The bankruptcy act was demanded and passed mainly for the former. The latter is in its nature incidental to the former, which is the principal thing. There probably existed in every State, at the time of the passage of the bankruptcy law, some statutory provisions for the distribution of the effects of insolvent debtors among their creditors, and it can hardly be supposed that Congress intended to repeal or suspend those State laws, except so far as was necessary for the accomplishment of the main object in view, and that necessity may well be limited to those cases over which the Federal courts actually assert their jurisdiction within the time limited for that purpose. An assignment under the State law is good unless attacked within six months. If all the parties concerned desire that the estate may be settled in the State courts, it can be done. Should a case arise in which there will be an actual conflict of jurisdiction, the State courts must yield to the Federal courts, and when the bankruptcy court, within the time limited, asserts its jurisdiction, the proceedings in the State court are thereby superseded. Should the State courts attempt to grant a certificate of discharge to an insolvent debtor, no court would give any effect to it. *Maltbie v. Hotchkiss*, 5 B. R. 485; s. c. 38 Conn. 80; *Reed v. Taylor*, 4 B. R. 710; s. c. 32 Iowa, 209.

As a bankruptcy law merely suspends State insolvent laws without repealing them, they revive and are in force on the repeal of the bankruptcy law, and need not be re-enacted. *Lavender v. Gosnell*, 12 B. R. 282; s. c. 43 Md. 153.

The bankruptcy law must prevail in cases where it conflicts with the ordinance of 1787. *Stow v. Parks*, 1 Chand. 60.

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## TITLE V. COURT AND COURTS OF BANKRUPTCY.

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Act of 1898, CH. 1, § 1a. **Definitions.**—(24) “States” shall include the territories, the Indian Territory, Alaska, and the District of Columbia; (7) “court” shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) “courts of bankruptcy” shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; and (3) “appellate courts” shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States.

§ 2. That the courts of bankruptcy, as hereinbefore defined, viz., the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy.

§ 23. **Jurisdiction of United States and State Courts.**—(a) The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

(c) The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act.

ACT OF 1867, § 563.—Eighteenth. \* \* \* The district courts are constituted courts of bankruptcy, and shall have in their respective districts original jurisdiction in all matters and proceedings in bankruptcy.

Statute revised — March 2, 1867, ch. 176, § 1, 14 Stat. 517. Prior Statutes — April 4, 1800, ch. 19, 2 Stat. 19; Aug. 19, 1841, ch. 9, § 6, 5 Stat. 441.

Where a question arises involving right of national banks to make loans of a particular character upon mortgage, the assignee should be permitted to litigate such questions in the Federal courts, and should not be sent to State courts to try it upon the distribution of surplus moneys in a foreclosure suit; or in a suit brought by the party holding the alleged invalid mortgage. *In re Duryea*, 17 B. R. 495.

As to bankrupt and his wife, the bankruptcy proceedings do not divest the State court of jurisdiction of an action to foreclose a mortgage given by them. *McHenry v. La Société Française*, 16 B. R. 385.

A State court has no jurisdiction of an action brought against a trustee or assignee in bankruptcy to enjoin the collection of the assets of the bankrupt. *Southern et al. v. Fisher*, 16 B. R. 414.

Where assignee has a defense to a judgment which is available in equity, but not at law, it should be asserted by an independent suit on the equitable side of the court. *Stillwell v. Walker, Assignee*, 17 B. R. 569.

Under the law of 1867, upon a bill filed by an assignee in bankruptcy, the Circuit Court has power to enjoin the prosecution of an action of trover in a State court against the marshal for seizing the property of a third person under his warrant in bankruptcy. *Hudson v. Schwab et al.*, 18 B. R. 480.

Where an injunction was granted in a cause over which the court had clear jurisdiction, a writ of mandamus would not lie to vacate it, and the remedy was by appeal from the first decree. *Ex parte Schwab*, 18 B. R. 507.

An objection to a bill in which the complainant describes himself as an assignee, that he is not legally such assignee, must be made by plea and not demurrer. *Nicholas v. Murray*, 18 B. R. 469.

Assignees may sue to recover assets of the bankrupt in courts of a district other than that in which decree of bankruptcy was entered. *Dutcher v. Wright*, 16 B. R. 331.

State courts have jurisdiction of actions brought by an assignee in bankruptcy to set aside mortgages alleged to have been made in fraud of the bankruptcy act. *Isett v. Stuart*, 16 B. R. 191.

Section 711 of the United States Revised Statutes, which gives exclusive jurisdiction to the Federal courts over "all matters and proceed-

ings in bankruptcy," does not extend to actions brought by assignees to collect the assets of bankrupts. *Wente v. Young*, 17 B. R. 90; *Kidder v. Horrobin*, 18 B. R. 146.

Concurrent jurisdiction in State and Federal courts over actions brought to collect assets of bankrupt, whether legal or equitable or of whatever amount. *Ibid*.

A State court has jurisdiction of an action brought by an assignee in bankruptcy to foreclose a mortgage belonging to the estate. *Burlingame, Assignee, v. Parce*, 17 B. R. 246.

Acts of State courts done in the due exercise of their jurisdiction, not conflicting with the proper decrees and jurisdiction of the Federal courts, are valid and binding on the Federal courts. *In re Keller et al.*, 18 B. R. 10.

**Rule of Interpretation.**—The words of the bankruptcy act were, in most parts of it, wisely taken from the English statutes of 1849 and 1851, and from the insolvent law of Massachusetts. In applying the rule that the interpretation of a law forms a part of it, the construction of a statute by the courts of the country whose legislature enacted it, is adopted. The Supreme Court has more than once applied this rule where an American statute has been taken from a prior English one, and has followed its English construction where the meaning might otherwise have been doubtful. *Barnes v. Rettew*, 8 Phila. 133.

*Ex anteceditibus et consequentibus fit optima interpretatio*, is one of the most important canons of construction. Every part of a statute should be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done; or, in other words, the construction must be made upon the entire statute, and not merely upon disjointed parts of it. *Hall v. Deshler*, 71 Penn. 299.

In the construction of the law the principle of uniformity must not be out of sight, for such construction ought to be put on a statute as may best answer the intention the makers had in view. *Barstow v. Adams*, 2 Day, 70.

While a construction of a Federal law by the Federal courts other than Supreme, is not conclusive, it is entitled to careful consideration in the State courts. *Frank v. Houston*, 9 Kans. 406.

The English decisions properly apply as rules of construction. *Roosevelt v. Mark*, 6 Johns. Ch. 266; *Livermore v. Bagley*, 3 Mass. 487; *Murray v. De Rottenham*, 6 Johns. Ch. 52; *Tucker v. Oxley*, 5 Cranch, 34; s. c. 1 Cranch C. C. 419; *Globe Ins. Co. v. Cleveland Ins. Co.*, 14 B. R. 311; s. c. 8 C. L. N. 258.

**Character of the Jurisdiction.**—Courts of bankruptcy, as they existed in England at the time the act was passed, were, and still are, separate, distinct organizations, with powers and jurisdiction separate and distinct from all other courts, and it is undoubtedly in this sense that the words are used in the act; that is, courts possessing power and jurisdiction peculiar to themselves. The only difference is, that here, instead of creating a new organization, an organization already existing, known as the district court, is taken up and made use of in lieu of such new organiza-

tion. But the district court, when acting as a court of bankruptcy, is none the less a separate and distinct court, exercising powers and jurisdiction separate and distinct from its powers and jurisdiction as a district court, than if it were such separate and distinct organization. In *re Norris*, 4 B. R. 35; s. c. 1 Abb. C. C. 514; s. c. 1 L. T. B. 227.

Congress, in passing the act, in pursuance of its constitutional power, not only intended to make it uniform, but operative, throughout the United States. It does not stop at State lines. Property, wherever situate, which is not exempted from the operation of the act, passes to the assignee. This is equally true of property under mortgage, as of that which is unincumbered. Debts, whenever payable, and creditors, wherever residing within the United States, are within the operation of the act. The bankruptcy court is invested with this jurisdiction over the bankrupt and his estate, and over creditors who are brought involuntarily into it, in order to administer the estate for the benefit of all the creditors according to their respective rights. Thus, it is plain beyond controversy, that the property of the bankrupt, though situate in another State, and though mortgaged by the bankrupt, prior to the institution of proceedings in bankruptcy, is within the jurisdiction and under the control of the bankruptcy court. *Markson et al. v. Heaney*, 4 B. R. 510; s. c. 1 Dillon, 497.

The district court, as a court of bankruptcy, is the creature of statute, and has no powers except those conferred upon it, either expressly or by necessary implication, for the just and full execution of the law. In *re Robert Morris*, *Crabbe*, 70; *Clark v. Binninger*, 3 B. R. 518; s. c. 38 How. Pr. 341; s. c. 3 L. T. B. 49.

In administering the statute, the functions of the district court, as a court, are employed; and the jurisdiction is not a jurisdiction conferred on the judge, as a commissioner, in the nature of the appointment by which the chancellor formerly executed the bankruptcy law in England. In *re Barney Corse*, 1 N. Y. Leg. Obs. 231.

The strict rule of construction, which is applied in cases where a statute gives to a court power to do a particular thing, has no application to the bankruptcy law, where full and complete jurisdiction over an extensive subject is given to a court constituted for the purpose. In *re California Pacific R. R. Co.*, 11 B. R. 193; s. c. 3 Saw. 240.

In enjoining upon the district court to take cognizance of, and administer the bankruptcy law, Congress must be accepted to intend that, in every particular not otherwise designated by the statute, those courts should proceed with the new jurisdiction upon the principles appropriate to like proceedings under any other branch of their power. The law-giver, in adding to the range of their employment, must be supposed to contemplate that they will continue the use of their customary powers, unless he specially limits and restricts that use. In *re Barney Corse*, 1 N. Y. Leg. Obs. 231; in *re California Pacific R. R. Co.*, 11 B. R. 193; s. c. 3 Saw. 240.

The district court has jurisdiction of two distinct kinds: 1st. As a court of bankruptcy, over the proceedings in bankruptcy initiated by the petition and ending in the distribution of assets among the creditors, and the

discharge or refusal of a discharge to the bankrupt; 2d. As an ordinary court over suits at law or in equity, brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due to or from him. *Lathrop v. Drake*, 13 B. R. 472; s. c. 91 U. S. 516.

The jurisdiction of the district courts extends to all matters and proceedings in bankruptcy, without limit. When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. Each court within its own district may exercise the powers conferred, but those powers extend to all matters of bankruptcy without limitation. *Lathrop v. Drake*, 13 B. R. 472; s. c. 91 U. S. 516; *Burbank v. Bigelow*, 14 B. R. 445; s. c. 92 U. S. 179.

The words, "in their respective districts," must receive their usual ordinary signification, and manifest a purpose and intent in Congress to restrict and limit the authority and jurisdiction of the district courts in bankruptcy within their own districts, in accordance with the practice as it then was, and not to confer upon them a jurisdiction throughout the United States, in utter conflict with all prior legislation and the settled policy of Congress. While their authority does extend to all matters in bankruptcy, and there is no limit to the subject-matter over which the court has jurisdiction, yet they are expressly confined and restricted in its exercise to the limits of their own territory, and enjoy no other or greater power or authority outside of their own districts than they had before the bankruptcy act was passed. They can not summon parties before them from without their districts. *Paine v. Caldwell*, 6 B. R. 558; s. c. 29 Leg. Int. 284; *in re Hirsch*, 2 B. R. 3; s. c. 2 Ben. 493; s. c. 1 L. T. B. 92; *Markson et al. v. Heaney*, 4 B. R. 510; s. c. 1 Dillon, 497, 511, note.

An assignee can not proceed by attachment against a party in a district where the latter neither resides nor is found at the time of serving the writ. *Nazro v. Cragin*, 3 Dillon, 474.

The whole tenor of the bankruptcy act shows that Congress intended to provide for the complete administration of the bankrupt system in the Federal courts, and through the instrumentality of Federal officers. This section does not contain any words which justify the conclusion that the jurisdiction conferred by it is limited to the district court for the district in which the proceedings in bankruptcy are pending. District courts should be naturally auxiliary to each other to perfect and accomplish the object of the act. An assignee elected in one district may institute proceedings in the district court of another district to recover money paid by the bankrupt to a preferred creditor contrary to the provisions of the act. *Shearman v. Bingham*, 5 B. R. 34; s. c. 7 B. R. 490; s. c. 3 C. L. N. 258; *Goodall v. Tuttle*, 7 B. R. 193; s. c. 3 Biss. 219; *in re James Martin*, 5 Law Rep. 158; *Moore v. Jones*, 23 Vt. 739. Contra, *Jobbins v. Montague*, 6 B. R. 509; *in re Richardson*, 2 B. R. 202; s. c. 2 Ben. 517; s. c. 2 L. T. B. 20; *Markson v. Heaney*, 4 B. R. 510; s. c. 1 Dillon, 497.

The petitioning creditor who has filed a petition against the debtor in one district, may apply to the district court of another district to restrain

parties from interfering with the debtor's property. In *re James Martin*, 5 Law Rep. 158.

If the bankrupt sues on a demand which passed to his assignee, and recovers judgment, the district court may arrest the payment of the money to the bankrupt, and order it to be paid over to the assignee. *Moore v. Jones*, 23 Vt. 739.

If the assignee claims the benefit of a judgment recovered by the bankrupt in his own name, he must take it subject not only to such charges as are legally taxable and recoverable as costs, but also to all other reasonable charges and expenses incurred in obtaining the judgment. *Ibid*.

The attorney for the bankrupt can not be allowed for services rendered in opposition to a motion made by the assignee in a State court for leave to appear and prosecute the suit in his own name. *Ibid*.

A State court, in a collateral action, may inquire into the jurisdiction of the district court as a court of bankruptcy. *Chemung Canal Bank v. Judson*, 8 N. Y. 254.

A State court may inquire into the jurisdiction of the district court, and declare its decree void, where the decree was rendered without authority of law. *Wells v. Brackett*, 30 Me. 61.

The district court, although a court of limited jurisdiction, is not an inferior court in the technical sense of that term, and its jurisdiction need not appear on the face of the proceedings. *Chemung Canal Bank v. Judson*, 8 N. Y. 254; *Rucknam v. Cowell*, 1 N. Y. 505; *Reed v. Vaughn*, 10 Mo. 447; *Hayes v. Ford*, 15 B. R. 569. Vide *Morse v. Presby*, 25 N. H. 299.

An adjudication is in the nature of a decree in rem as respects the status of the debtor, and can not be impeached in a collateral action if the record shows that the court making it had jurisdiction over his person and the subject-matter. *Michaels v. Post*, 12 B. R. 152; s. c. 21 Wall. 398; *Bissell v. Post*, 4 Day, 79; *Sloan v. Lewis*, 12 B. R. 173; s. c. 22 Wall. 150.

A decree adjudging a corporation bankrupt is in the nature of a decree in rem as respects the status of the corporation, and if the court rendering it has jurisdiction, can only be assailed by a direct proceeding in a competent court, unless it appears that the decree is void in form, or that due notice of the petition was never given. *New Lamp Chimney Co. v. Ansonia Brass and Copper Co.*, 10 B. R. 355; s. c. 13 B. R. 385; s. c. 64 Barb. 435; s. c. 53 N. Y. 123; s. c. 91 U. S. 656.

A creditor can not impeach an adjudication in a collateral action on the ground that it was procured by fraud. *Michaels v. Post*, 12 B. R. 152; s. c. 21 Wall. 398.

Although the record does not show affirmatively that the district court acquired jurisdiction of the person of the bankrupt, that fact will be presumed. *Chemung Canal Bank v. Judson*, 8 N. Y. 254; *Wright v. Watkins*, 2 Greene (Iowa), 547.

Where a court has jurisdiction to hear and determine a question either at law or in equity, it must of necessity have the power of determining in which form the remedy shall be administered; and an error of judgment on that point can not be urged as a defect of jurisdiction in a collateral action. *Chemung Canal Bank v. Judson*, 8 N. Y. 254.



Where an involuntary proceeding is dismissed, and then reinstated without further notice to or appearance by the debtor, the adjudication is void, and a payment to an assignee, under an order of the district court, will not protect the party making such payment. *Gage v. Gates*, 15 B. R. 145; s. c. 62 Mo. 412.

ACT OF 1898, CH. 4, § 19. **Jury Trials.**— See *post*, p. 294.

ACTS OF 1867 and 1874, § 566. The trial of issues of fact in the district court, in all causes except in cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury. \* \* \*

Statutes revised — Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76; Feb. 28, 1845, ch. 20, 5 Stat. 726.

§ 648. The trial of issues of fact in the circuit courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy. \* \* \*

Statute revised — Sept. 24, 1780, ch. 20, § 12, 1 Stat. 79.

§ 711. The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States. \* \* \*

Sixth. Of all matters and proceedings in bankruptcy.

The jurisdiction thus given depends wholly upon the act, and is necessarily exclusive, because independently of it there is no jurisdiction in any tribunal over any such proceedings, and no original jurisdiction is given to any other. This includes all proceedings for adjudging any one a bankrupt, thereby vesting title to his property in an assignee appointed pursuant to the act. *Cook v. Whipple*, 9 B. R. 155; s. c. 55 N. Y. 150.

By the proceedings and adjudication, jurisdiction is obtained of the bankrupt and his creditors, and the court making the adjudication is the only one that can deal with the bankrupt and his creditors, and settle all conflicting claims, equities and controversies arising between them. All such matters are exclusively within the jurisdiction of the court where the proceedings are pending. *Goodall v. Tuttle*, 7 B. R. 193; s. c. 3 Biss. 219.

‘A State court, on the application of the debtor, may enjoin the petitioning creditor from prosecuting a fraudulent and oppressive petition in bankruptcy against him, especially if the latter invoked the jurisdiction of the State court to enforce his claim before filing the petition. *Pusey v. Bradley*, 1 N. Y. Supr. 661; s. c. 46 How. Pr. 255.

No State court can by any process prevent a party from applying to the district court for the benefit of the provisions of the bankruptcy law. *Watson v. Citizens' Savings Bank*, 11 B. R. 161; *Fillingim v. Thornton*, 12 B. R. 92; s. c. 49 Ga. 384.

The district court will not prevent a seizure of the bankrupt's property on execution, or a delivery to a receiver before an adjudication in a voluntary case, for it has no exclusive power over the property until there is an adjudication. *In re W. C. H. Waddel*, 1 N. Y. Leg. Obs. 53.

The jurisdiction of a district court of the United States, sitting as a court of bankruptcy, is superior and exclusive in all matters arising under the statute. The estate surrendered is placed in the custody of the court so sitting in bankruptcy, and the officer appointed to manage it is accountable to the court appointing him, and to that court alone. No court of an independent State jurisdiction can withdraw the property surrendered, or determine in any degree the manner of its disposition. *In re Barrow, re Loeb, Simon & Co., re Winter*, 1 B. R. 481; s. c. 1 L. T. B. 63; *in re Vogel*, 2 B. R. 427; s. c. 3 B. R. 198; s. c. 7 Blatch. 18; s. c. 2 L. T. B. 154; *in re People's Mail Steamship Co.*, 2 B. R. 553; s. c. 3 Ben. 226; *in re Kerosene Oil Co.*, 2 B. R. 528; s. c. 3 Ben. 35; s. c. 2 L. T. B. 79; *Brock v. Terrel*, 2 B. R. 643; *Pennington v. Sale & Phelan et al.*, 1 B. R. 572; *Jones v. Leach et al.*, 1 B. R. 595; *in re Wallace*, 2 B. R. 134; s. c. 1 Deady, 433; *Buckingham v. McLean*, 3 McLean, 185; s. c. 13 How. 151; *Watson v. Citizens' Savings Bank*, 11 B. R. 161.

Any interference with the property, while so in the custody of the court, is liable to be punished as a contempt. *In re Vogel*, 2 B. R. 427; s. c. 3 B. R. 198; s. c. 7 Blatch. 18; s. c. 2 L. T. B. 154.

From the time of the filing of the bankrupt's petition, the property is in the custody of the bankruptcy court, and at least from the time of the appointment of the assignee, the possession of it by the bankrupt is, in law, the possession of it by the assignee. *In re J. M. Rosenberg*, 3 B. R. 130; s. c. 3 Ben. 366.

The district court would fail in its duty if it were to suffer the possession of the assignee to be forcibly displaced by a third person, although using the form of the process of a State court, in a suit to which the assignee is not a party, and in which the title of the assignee is not in question, but where the property would be subjected to such a fate as a contest between two strangers to the proceedings in bankruptcy might involve. *Samson v. Blake*, 6 B. R. 410; s. c. 9 Blatch. 379.

The district court has the power to protect the possession of the assignee against interference, except by a resort to a proper legal proceeding, to which he is a party; and if the property is taken from his possession without such proceeding, may compel its return. *Ibid.*

A party who holds a claim that is not provable need not apply to the district court for leave to issue an execution. *Black v. McClelland*, 12 B. R. 481; s. c. 7 C. L. N. 420.

A State court has no jurisdiction to direct a depository of the bankrupt court to pay a judgment against the assignee out of the funds of the estate deposited with it. *Havens v. Nat'l. City Bank*, 13 B. R. 95; s. c. 6 N. Y. Supr. 346.

The appointment of the assignee in bankruptcy relates back, and gives to him title to all the estate, real and personal, legal and equitable rights, interests and things in action which belonged to the debtor on the presentation of the petition. From and after the filing of the petition, therefore, creditors can acquire no interest by receivership, or otherwise, in the property of the debtor which the decree in bankruptcy will not displace or annul. *Buchanan v. Smith*, 4 B. R. 397; s. c. 7 B. R. 513; s. c. 8 Blatch. 153; s. c. 16 Wall. 277; *Stuart v. Hines*, 6 B. R. 416; s. c. 33 Iowa, 60; s. c. 5 L. T. B. 46; *Vidal v. Ocean Ins. Co.*, 5 Rob. (La.) 68; *Pennington v. Sale & Phelan et al.*, 1 B. R. 572; *Jones v. Leach et al.*, 1 B. R. 595; *in re Geo. W. Anderson*, 9 B. R. 360; *McLean v. Rocky*, 3 McLean, 235; *Thames v. Miller*, 2 Woods, 564.

The levy of an attachment after the commencement of proceedings in bankruptcy is absolutely void. *Stuart v. Hines*, 6 B. R. 416; s. c. 33 Iowa, 60; s. c. 5 L. T. B. 46; *Welsenfeld v. Mispelhorn*, 5 W. Va. 46; *Oliver v. Smith*, 5 Mass. 183; *Whitney v. Lodge* 1 W. N. 170.

The title of the assignee will prevail over an attachment issued after the commencement of the proceedings in bankruptcy, but before the adjudication. *Phillips v. Helmbold*, 26 N. J. Eq. 202.

The issuing of an injunction out of the district court, restraining a purchaser and the sheriff from disposing of goods, does not confer such exclusive jurisdiction over the subject as to prevent the purchaser from instituting an action against the sheriff. *Hathaway v. Brown*, 18 Minn. 414.

When money is raised upon an execution, and paid into court for distribution, a party who sets up a title adverse to the proceedings can not come in and claim any share. Thus, if the goods of A. are sold upon an execution against B., A. can not be heard to urge his rights to the proceeds, however clear and indisputable may be his title to the goods. An assignee of the debtor, by a transfer prior to the levy, is an adverse claimant. If a levy is made after the commencement of proceedings in bankruptcy, the assignee can not claim the proceeds of the sale. His remedy is by an action against the sheriff's vendee or the sheriff himself. *Bush's Appeal*, 65 Penn. 363.

If the bankrupt is a tenant in possession of land, the landlord can not eject him by summary proceedings instituted in a State court under a statute relating to tenants holding over after the expiration of their terms. *In re Enoch Steadman*, 8 B. R. 319.

The omission of the bankrupt to apply for an injunction to prevent any interference with the property will not justify or excuse the parties who are guilty of such interference. *Ibid.*

When the assignee in bankruptcy finds property in the possession of the bankrupt, and takes it into his custody, he becomes possessed of it in the course of his official duties, and can not be deprived of it by a summary proceeding in a State court, under whose f. fa. the sheriff had made a levy previously to the commencement of proceedings in bankruptcy. The sheriff has his remedy by an action of trover, or he may institute the proper proceedings in the bankruptcy court, to which the assignee is amenable. *Hill v. Fleming*, 39 Ga. 662.

A creditor may proceed in a State court to reach property of the bankrupt which the assignee has abandoned as being a burden rather than a benefit. *Rugely v. Robinson*, 19 Ala. 404.

A bankrupt who has received a discharge is not entitled to file an objection to the ratification of a sheriff's sale made after the commencement of the proceedings in bankruptcy, for he has no interest in the fund or in the land. All reasonable presumption is against the existence of any surplus from his estate after the payment of his debts. *Laird v. Laird*, 9 Penn. L. J. 474.

When the assignee has lawfully sold the property, the district court is not authorized to interfere at the instance of the purchaser, to vindicate his title. If another sees fit to contest his title, the controversy, like others of a like nature, is to be determined by the State tribunals. *Briggs v. Stephens*, 7 Law Rep. 281.

Claims against the property of the bankrupt, so long as it remains in the possession of the bankruptcy court, can only be enforced in the district court sitting as a court of bankruptcy. In *re People's Mail Steamship Co.*, 2 B. R. 553; s. c. 3 Ben. 226; *Jones v. Leach et al.*, 1 B. R. 595; *Davis, Assignee of Bittel et al.*, 2 B. R. 392; in *re Kerosene Oil Co.*, 2 B. R. 528; s. c. 3 B. R. 125; s. c. 3 Ben. 35; s. c. 6 Blatch. 521; s. c. 2 L. T. B. 79; in *re Snedaker*, 3 B. R. 629.

If a party has a claim, lien, or interest in the property in the hands of an assignee in bankruptcy he should apply to the bankruptcy court for relief, and that court may grant the relief or allow a suit to be brought either in the district court or the State courts, to determine the same; but without such consent, parties have no right to sue, and are guilty of a contempt of the authority of the bankruptcy court if they do sue. The bankruptcy court will insist upon its right to administer and distribute the property. Parties should understand that they have no right to commence suits against an assignee to affect the property, for as he is accountable to the bankruptcy court for the property, it is the duty of the court to protect him in the possession. The Federal courts sedulously avoid all interference with property held by the State courts or their officers, and they, with equal solicitude and firmness, maintain their right to hold property which is in their possession or in the custody of their officers, against the process of any State court, and will not permit persons, through process issuing from State courts, to interfere with impunity with property so in the possession of the Federal courts or their officers. In *re Cook & Gleason*, 3 Biss. 116.

A mortgagee has no right to take possession of the mortgaged premises after the commencement of proceedings in bankruptcy. *Hutchings v. Muzzy Iron Works*, 8 B. R. 458; s. c. 6 C. L. N. 27.

A subsequent sale, whether under judgment or mortgage, without the consent of the bankruptcy court, is subject to be set aside by that court. *Davis v. Anderson*, 6 B. R. 145.

Costs incurred in the prosecution of a suit to enforce a lien commenced after the filing of the petition can not be allowed. The creditor who institutes such a suit must give it up before he can be paid the amount of his claim by the bankruptcy court. In *re Cook & Gleason*, 3 Biss. 116.

A creditor having a mechanic's lien upon the property of the bankrupt may file a petition to enforce it in a State court, even after the commencement of proceedings in bankruptcy, when such filing may be necessary in order to keep the lien alive. Pending the bankruptcy proceedings, no order can be made on this petition for the sale of the property to satisfy the lien of the petitioner. The rights of the creditor will be preserved, and all interference with the custody or jurisdiction of the bankruptcy court avoided by ordering the petition to stand continued in the State court to await the result of the action of the district court in the proceedings in bankruptcy. *Clifton et al. v. Foster et al.*, 3 B. R. 656; s. c. 103 Mass. 233; *in re Cook & Gleason*, 3 Biss. 116; *Douglass v. St. Louis Zinc Co.*, 56 Mo. 368.

Although a creditor has obtained a lien on the personal property of the bankrupt, yet he can not proceed to examine the bankrupt in a State court to discover such property. *In re Samuel T. Taylor*, 16 B. R. 40.

The following proceedings, instituted after the commencement of proceedings in bankruptcy, have been enjoined by the district court, to-wit:

The sale of property by the sheriff, under an execution issued from a State court upon a levy made after the petition in bankruptcy was filed. *Pennington v. Sale & Phelan et al.*, 1 B. R. 572; *Jones v. Leach et al.*, 1 B. R. 595; *in re Wallace*, 2 B. R. 134; s. c. 1 Deady, 433; *in re John S. Foster*, 2 Story, 131; *in re Bellows & Peck*, 3 Story, 428.

Proceedings by a mortgagee to foreclose a mortgage on the property of the bankrupt. *In re Kerosene Oil Co.*, 2 B. R. 528; s. c. 3 B. R. 125; s. c. 3 Ben. 35; s. c. 6 Blatch. 521; s. c. 2 L. T. B. 79; *in re Snedaker*, 3 B. R. 629; *Markson v. Heaney*, 4 B. R. 510; s. c. 1 Dillon, 497; *Whitman v. Butler*, 8 B. R. 487; *Buckingham v. McLean*, 3 McLean, 185; s. c. 13 How. 151.

A libel in rem, brought to enforce a lien against a vessel. *In re People's Mail Steamship Co.*, 2 B. R. 553; s. c. 2 Ben. 226. *Contra*, *The Ironsides*, 4 Biss. 518.

Proceedings on the part of a landlord to collect rent by distraint. *Brock v. Terrel*, 2 B. R. 643; *in re Wynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116; s. c. 9 A. L. Reg. 627. *Vide* *Butler v. Morgan*, 8 W. & S. 53.

Proceedings under a State insolvent law. *In re Eames*, 2 Story, 322.

The assignee of a bankrupt is not the assignee of his creditors, nor of all the judgments, executions, liens and mortgages outstanding against his property. He takes only the bankrupt's interest in property, nor has he the right, title or interest, which other parties have therein, nor any control over the same, further than is given expressly by the bankruptcy act, as auxiliary for the preservation of the bankrupt's interest for the benefit of his general creditors. It would be absurd to contend that the assignee becomes ipso facto seized in entirety as trustee of every article of property in which the bankrupt has any interest or share. *Goddard v. Weaver*, 6 B. R. 440; s. c. 1 Woods, 257.

Where the levy of an execution is made before the commencement of the proceedings in bankruptcy the possession of the sheriff can not be disturbed by the assignee. The latter in such case is only entitled to such residue as may remain after the debt for which the execution issued has been satisfied. *Marshall v. Knox*, 8 B. R. 97; s. c. 16 Wall. 551; *Savage v.*

*Best*, 3 How. 111; *Norton v. Boyd*, 3 How. 426; *Doremus v. Walker*, 8 Ala. 194; *Fritsch v. Van Middendorfer*, 2 Cinn. 261; *Fehley v. Barr*, 66 Penn. 196; *Thompson v. Moses*, 43 Ga. 383; *Goddard v. Weaver*, 6 B. R. 440; s. c. 1 Woods, 257; *Maris v. Duren*, 1 Brewst. 428; s. c. 6 Phila. 327; in re *Donaldson*, 1 B. R. 181; s. c. 1 L. T. B. 5; s. c. 7 A. L. Reg. 213; s. c. 6 Phila. 143; in re *Smith et al.*, 1 B. R. 599; s. c. 2 Ben. 432; s. c. 1 L. T. B. 112; in re *Wilbur*, 3 B. R. 276; s. c. 1 Ben. 527; s. c. 2 L. T. B. 171; in re *Campbell*, 1 B. R. 165; s. c. 1 Abb. C. O. 185; s. c. 1 L. T. B. 30; s. c. 6 Phila. 445; in re *Burns*, 1 B. R. 174; s. c. 7 A. L. Reg. 105; s. c. 6 Phila. 448. Vide *Turner v. The Skylark*, 4 Biss. 388; in re *Schnepf*, 1 B. R. 190; s. c. 2 Ben. 72; *Lewis v. Flisk*, 6 Rob. (La.) 159.

The sheriff must proceed to sell the property, unless he is prevented by some proceeding instituted in the bankruptcy court for the purpose of liquidating the lien and adjusting all claims and equities. *Sharman v. Howell*, 40 Ga. 257; *Wheeler v. Redding*, 55 Ga. 87.

The sheriff is liable to the execution creditor if he relinquishes the custody of the property upon the mere demand of the marshal and exhibition of the warrant. *Ansonia B. & C. Co. v. Babbitt*, 15 N. Y. Supr. 157.

When a receiver, appointed by a State court before the commencement of proceedings in bankruptcy, has taken possession of the property which belonged to the bankrupt, and the jurisdiction of the State court over the subject-matter of the suit thereon, and over the parties thereto when it was instituted and the receiver was appointed, and its jurisdiction to appoint such receiver are in no manner impeached or questioned, the district court can not compel the receiver to give up the possession of such property without its being shown that such possession of the property by the State court is void or invalid by reason of the provisions of the bankruptcy act. In re *Clark et al.*, 3 B. R. 491; s. c. 4 Ben. 88; *Clark v. Binniger*, 3 B. R. 518; s. c. 38 How. Pr. 341; s. c. 3 L. T. B. 49; *Sedgwick v. Mink et al.*, 1 B. R. 675; s. c. 6 Blatch. 156; *Alden v. Boston, Hartford & Erie R. R. Co.*, 5 B. R. 230; *Davis v. Railroad Co.*, 13 B. R. 258; s. c. 1 Woods, 661.

Proceedings in bankruptcy supersede all other proceedings for the administration of the assets of the debtor, subject only to the priorities which have been obtained by any creditor by the use of diligence. In re *R. M. Whipple*, 13 B. R. 373; s. c. 6 Biss. 516.

A creditor who has filed a creditor's bill in the State court and obtained the appointment of a receiver, prior to the commencement of the proceedings in bankruptcy, may be enjoined from proceeding further in the State court. *Ibid.*

When a State court has acquired jurisdiction over the parties to a creditor's bill and appointed a receiver, before the commencement of the proceedings in bankruptcy, it will not on a mere motion direct a delivery of the property to the assignee. *Freeman v. Fort*, 14 B. R. 46; s. c. 52 Ga. 371.

If a receiver is appointed by a State court in a suit by stockholders against a corporation, the court will not at the instance of creditors, on the subsequent bankruptcy of the corporation, discharge the receiver and

turn the property over to the assignee. *Myer v. Crystal Works*, 14 B. R. 9; s. c. 8 C. L. N. 197.

Where a receiver has been appointed by a State court in a proceeding for the dissolution of a partnership prior to the commencement of proceedings in bankruptcy against the firm, the court has the right to finish its proceedings before being interfered with by any other court. If the assignee has rights, or is entitled to the fund, his right and title can be and will be disposed of by the State court as the law shall direct. *Miller v. Bowles*, 9 B. R. 354; s. c. 10 B. R. 515; s. c. 2 N. Y. Supr. 568; s. c. 58 N. Y. 253; *Clark v. Binninger*, 39 How. Pr. 363.

The plaintiff in such a suit for a dissolution of partnership can not have the decree appointing a receiver rescinded and the property turned over to an assignee. *Miller v. Bowles*, 9 B. R. 354; s. c. 10 B. R. 515; s. c. 2 N. Y. Supr. 568; s. c. 58 N. Y. 253.

If the assignee has filed a bill to set aside a sale made by a receiver, he must elect whether he will proceed with it or claim the fund. He can not go upon the property and the fund both. *Loudon v. Blanford*, 56 Ga. 150.

If a receiver has been appointed, the State court will retain control of the property until it shall be applied to the partnership debts, although the assignee of the partnership property, who has been subrogated to the rights of both the plaintiff and defendant, asks that the suit may be discontinued, and the property delivered to him. *Clark v. Binninger*, 39 How. Pr. 363.

Parties in a State court may be enjoined from obtaining a writ of sequestration to take property from the possession of the assignee, although the suit was instituted before the commencement of the proceedings in bankruptcy. *Hewitt v. Norton*, 13 B. R. 276; s. c. 1 Woods, 68.

The district court has no authority to withdraw cases instituted in a State court before the commencement of proceedings in bankruptcy from the State courts, and proceed to settle and adjust the claims of the parties thereto. Congress could, no doubt, have made adjudication in bankruptcy operate proprio vigore to withdraw all cases in which the bankrupt should be a party pending in the State courts in the district at the time of the filing of the petition, from those tribunals, and transfer them into the district court. It has not, however, done so. It not only has not deprived the State courts of jurisdiction over such causes, but it has provided for their prosecution and defense in those courts by the assignee. *Samson v. Burton et al.*, 4 B. R. 1; s. c. 5 Ben. 325. Vide *Clarke v. Rosenda*, 5 Rob. (La.) 27; *Lewis v. Fish*, 6 Rob. (La.) 159.

Full force and efficacy may be given to that clause in the bankruptcy act which confers on the district courts of the United States jurisdiction over the ascertainment and liquidation of liens, without taking from the courts under whose process they exist the power of rendering special judgments necessary to complete them. *Leighton v. Kelsey et al.*, 4 B. R. 471; s. c. 57 Me. 85.

Proceedings to enforce the lien of a creditor pending at the commencement of proceedings in bankruptcy are not affected thereby, but the cred-

itor may proceed to obtain satisfaction of his lien. *Baum v. Stern*, 1 Rich. (N. S.) 415. *Contra*, *Taylor v. Bonnett*, 38 Tex. 521.

The jurisdiction of the district court over proceedings for the condemnation of property under the internal revenue laws is not divested by the commencement of proceedings in bankruptcy against the distiller. *U. S. v. Mackoy*, 2 Dillon, 209.

The State court may distribute the money which the sheriff holds on process which was issued to him before the filing of the petition. *Weld v. O'Brien*, 4 A. L. J. 364; *In re Campbell*, 1 B. R. 165; s. c. 1 Abb. C. C. 185; s. c. 1 L. T. B. 30; s. c. 6 Phila. 445.

When the State court has jurisdiction to enforce a lien and sell the property, it may distribute any surplus that may remain after the payment of the lien among subsequent lien creditors. The power to enforce the lien gives the right to decree a distribution. *In re Biddle's Appeal*, 9 B. R. 144; s. c. 68 Penn. 13.

The assignee takes the rights of the debtor in the same plight and condition as the debtor himself possessed them, and the purchaser from him will be bound by a decree for a partition rendered before the filing of the petition. *Baum v. Stern*, 1 Rich. (N. S.) 415.

The assignee of the judgment debtor is the proper party to move to set aside sales made under an execution issued thereon when the same are irregular and void. *Pardee v. Leitch*, 6 Laus. 303.

The court where a judgment is rendered is the proper, and, indeed, the only court where a motion can be made to amend it, and such amendment may be made, although the defendant has been declared a bankrupt, and the proceedings in bankruptcy are pending at the time when the motion is made. *Woolfolk v. Gunn*, 10 B. R. 526; s. c. 45 Ga. 117.

Although a fl. fa. is issued prior to the commencement of proceedings in bankruptcy, yet if the property taken thereunder is, by the consent of the creditor, the debtor and the sheriff, sold after that time, the proceeds must be turned over to the assignee, for they do not come into the State court by final process. *Morris v. Davidson*, 11 B. R. 454; s. c. 49 Ga. 361.

Where a sheriff who is selling the goods at private sale with the consent of the mortgagor and mortgagee, under a mortgage fl. fa. receives a general fl. fa. before the commencement of the proceedings in bankruptcy, the proceeds arising from private sales, after that time, are before the State court, as money raised on final process, and may be distributed to the judgment creditor and not to the assignee. *Dyson v. Harper*, 54 Ga. 282.

The filing of a petition in bankruptcy, and the execution of an assignment to the assignee after the filing of a bill in equity is a sufficient excuse for not making an assignment to a receiver appointed by the State court. *Watkins v. Pinkney*, 3 Edw. Ch. 533.

The mere filing of the petition in bankruptcy is no ground for refusing to execute an assignment to a receiver appointed in a suit instituted prior to that time, for the debtor may withdraw his petition, and thus defeat the jurisdiction of both courts. *Ibid*.

If a creditor prior to the commencement of proceedings in bankruptcy has filed a bill in a State court to reach the equitable assets of the debtor,



and has thereby obtained a lien thereon, he may continue the suit. *Clark v. Rist*, 3 McLean, 494.

The jurisdiction of a State court over a pending action to enforce a mechanic's lien is not divested by proceedings in bankruptcy. *Seibel v. Simeon*, 62 Mo. 255.

A State court is not divested of jurisdiction over a pending action to enforce a vendor's lien by the bankruptcy of the vendee. *Boone v. Revis*, 44 Tex. 384.

The district court will not allow a creditor to avail himself of any unjust and unlawful advantage merely because his suit is depending in a State court, for the laws of the United States are to the extent of the constitutional limits paramount to the authority of those of the States. *In re Bellows & Peck*, 3 Story, 428.

Where the power of a State court to proceed in a suit is subject to be impeached, it can not be done, except upon an intervention by the assignee, who must state the facts and make the proof necessary to terminate such jurisdiction. *Doe v. Childress*, 11 B. R. 317; s. c. 21 Wall. 643.

The district court can not entertain an action brought by the assignee against a sheriff to recover the money received on a sale under an execution issued on a judgment which is void under the bankruptcy law. *Atkinson v. Purdy, Crabbe*, 551.

If the property of the bankrupt has been sold under an execution issued upon a judgment which is void under the bankruptcy law, the assignee should apply to the State court. *Atkinson v. Purdy, Crabbe*, 551; *in re Burns*, 1 B. R. 174; s. c. 7 A. L. Reg. 105; s. c. 6 Phila. 448.

If the assignee receives property which the marshal has taken from the possession of the sheriff and sells it, the judgment creditor can not maintain an action in a State court for the amount of his judgment, for a State court has no jurisdiction to liquidate a lien. *Ansonia B. & C. Co. v. Pratt*, 17 N. Y. Supr. 443.

## **TITLE VI.**

### **COURTS OF BANKRUPTCY, THEIR JURISDICTION, ORGANIZATION AND POWERS.**

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ACT OF 1898, CH. 1, SEC. 1. \* \* \* (16) **Definition.**— Judge shall mean a judge of a court of bankruptcy, not including the referee.

CH. 2, § 2. \* \* \* **Creation of Courts of Bankruptcy and Their Jurisdiction.**—That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this Act, in accordance with the laws of pro-

cedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and (19) transfer cases to other courts of bankruptcy.

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

ACT OF 1867, § 4972.—The jurisdiction conferred upon the district courts as courts of bankruptcy shall extend —

First. To all cases and controversies arising between the bankrupt

and any creditor or creditors who shall claim any debt or demand under the bankruptcy.

Second. To the collection of all the assets of the bankrupt.

Third. To the ascertainment and liquidation of the liens and other specific claims thereon.

Fourth. To the adjustment of the various priorities and conflicting interest of all parties.

Fifth. To the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors.

Sixth. To all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.<sup>1</sup> *Provided*, That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides, having jurisdiction of claims of such nature and amount.

Statute revised — March 2, 1867, ch. 176, § 1, 14 Stat. 517. Prior Statutes — Aug. 19, 1841, ch. 9, § 6, 5 Stat. 445.

An assignee can not maintain an action in a State court to recover the value of property exceeding \$500 transferred to the defendant in violation of the bankruptcy law. *Olcott v. Maclean*, 16 B. R. 79; s. c. 17 N. Y. Supr. 277.

If the assignee and another claim a fund, the holder may file a bill of interpleader in a State court, for the proceeding is not an action to collect the assets. *B. & M. Ins. Co. v. Davenport*, 17 N. Y. Supr. 264.

**Construction.**—In order to avoid all doubt, the section goes on to enumerate certain specific classes of cases to which the jurisdiction shall be deemed to extend, not by way of limitation, but in explanation and illustration of the generality of the preceding language. In *re William Christy*, 3 How. 292; In *re Dudley*, 1 Penn. L. J. 302; *Mitchell v. Manuf. Co.*, 2 Story, 618; in *re L. Glaser*, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. R. 57.

It is more logical to construe this section throughout as giving the most ample powers to the district courts to conduct and settle the proceedings in bankruptcy, but as not relating to suits at law or in equity between the assignee and third persons, which are regulated by the second section. *Shearman et al. v. Bingham et al.*, 5 B. R. 34; s. c. 7 B. R. 490; s. c. 3 C. L. N. 258; *Jobbins v. Montague*, 6 B. R. 509.

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<sup>1</sup> So amended by act of June 22, 1874, ch. 390, § 2, 18 Stat. 178.

Congress meant to provide a system capable of entire self-execution by the national tribunals without the assistance or co-operation of the States, if the parties interested should choose to rely on the national courts. The jurisdiction given to the district courts is ample for all such purposes. *Mitchell v. Manuf. Co.*, 2 Story, 648; *Zahn v. Fry*, 9 B. R. 546; s. c. 21 Pitts. L. J. 155; s. c. 31 Leg. Int. 197.

In the absence of this clause, it might well be doubted whether the district court would have had jurisdiction of an action brought by the assignee for the recovery of a debt due, or property belonging to the bankrupt, when both parties were citizens of the same State. To remove such doubt was the purpose of the clause, and not at all to deprive State courts of jurisdiction of such actions, when vested in them by the laws and Constitutions of the States. *Cook v. Whipple*, 9 B. R. 155; s. c. 55 N. Y. 150.

The last clause of this section is manifestly added in order to prevent the force of any argument that the specific enumeration of the particular classes of cases ought to be construed as excluding all others not enumerated. In *re William Christy*, 3 How. 202.

Jurisdiction of a bankruptcy court may be impeached in collateral actions. *Isett v. Stuart*, 16 B. R. 191.

Residence, or carrying on business, in the district for six months is a jurisdictional fact, and the petition must contain an allegation showing it. But, upon application for discharge, the creditors may show that the alleged ground of jurisdiction did not exist. In *re Beals*, 17 B. R. 107.

Under law of 1867, court had no power in voluntary proceedings to adjudicate any person a bankrupt who was not a citizen of the United States at time of filing petition, though doing business within the district. In *re Burton & Watson*, 17 B. R. 212.

Where want of jurisdiction appears upon the petition in bankruptcy the consent of parties can not give jurisdiction, and the court, of its own motion, should take notice of the point. In *re Hopkins v. Carpenter et al.*, 18 B. R. 339.

Where the bankruptcy court has adjudged a claim to be a lien upon property of the bankrupt, it has jurisdiction of an action to enforce such lien against third parties who have purchased said property subject to the lien at a sale by the assignee. *Bucknam v. Dunn et al.*, 16 B. R. 470.

Bankruptcy court has full jurisdiction over the wife's "specific claim" to a settlement out of the bankrupt estate; and her coming voluntarily into the bankruptcy court, by petition, to assert that claim gives the court jurisdiction, personally as to herself, to ascertain and liquidate that claim. In *re Campbell*, 17 B. R. 4.

The district court has jurisdiction of a controversy as to the ownership of a fund in the hands or under the control of the assignee in bankruptcy without regard to residence of the parties in interest. In *re Sabin*, 18 B. R. 151.

Where such controversy is pending, the court will detain such fund until the rights of the parties thereto have been determined by such suit. *Ibid.*

Where a wife's separate estate has been changed from one form of investment to another, by agreement between herself and her husband, and before the title to the property newly acquired had been made to her, the husband becomes bankrupt, the bankruptcy court, as a court of equity, will treat that as done which ought to be done, and decree a settlement upon the wife of property acquired with her separate means. *In re Campbell*, 17 B. R. 4.

On application by assignee for his discharge any misconduct on his part in respect to estate is a proper subject for examination. *In re Peabody*, 16 B. R. 243.

District court not deprived of jurisdiction to entertain proceedings for a composition by the fact that petition to review an order refusing to discharge the bankrupt is pending in Circuit Court (Law of 1867). *In re Odell*, 16 B. R. 501.

In such case bankrupt should be required to pay opposing creditor expenses and disbursements, other than counsel fees, incurred in opposing the discharge, as a condition of and prior to confirmation of the composition. *Ibid.*

The district court which granted a discharge alone has jurisdiction of a proceeding to annul it. *Nicholas v. Murray*, 18 B. R. 469.

A suit by an assignee to set aside a fraudulent conveyance made by the bankrupt, after his discharge, of property concealed prior thereto is not a suit to annul such bankrupt's discharge, and may, therefore, be brought in the Circuit Court. *Ibid.*

Bankruptcy court has a right to and will, on application, enjoin creditors from harassing the debtor as long as his composition proceeding is pending. *In re Richard H. Hinsdale*, 16 B. R. 530.

A general provision in a resolution of composition, under law of 1867, that payment of so much money at such time or times, etc., shall be accepted by the creditors in satisfaction of the debts due them, is not, as respects the creditors, an executing provision which the court is authorized to enforce. A tender of the money according to the terms of such composition is equivalent to payment, but the court can not imprison the creditor for contempt to compel him to physically take the offered money. *Ibid.*

The moment a voluntary petition is filed, all the property of a bankrupt in possession or in action which is included in the inventory and schedules comes into the prehensory power of the court as fully as if it were in the actual and visible presence of the court, and consequently is under its protection and within its exclusive control. *Vyrd v. Harrold et al.*, 18 B. R. 433.

The bankrupt had given certain mortgages upon his exempt property, in which he had waived all his exemption rights under the State Constitution and laws, and under the bankruptcy act, in and to the property mortgaged, and also his right to a discharge in bankruptcy. The assignee left the property in the hands of the bankrupt, as custodian, until he could procure the schedules and proceed to administer the estate. The mortgages were afterward foreclosed, and the executions levied on the mort-

gaged property which had been returned in the schedules. The assignee never had actual possession of the property levied on. *Held*, that the waiver could not be enforced until the property was designated and allotted to the bankrupt; that the levy was a positive contempt of the jurisdiction of the court, and was not justified by the ignorance of the mortgagees and the sheriff as to the bankruptcy of the mortgagor and the appointment of the assignee, as they might easily have obtained knowledge of these facts. *Ibid*.

Upon institution of proceedings in bankruptcy an assignee in bankruptcy may be enjoined from interfering with the debtor's assets before an adjudication has been had. *In re Jacob Skoll*, 16 B. R. 175.

Where the assignee sold property incumbered by a chattel mortgage, without an order of court, and the mortgagee brought trover against the purchaser in a State court, in a county where the parties and their witnesses resided: *Held*, that even if the district court had jurisdiction to restrain the prosecution of such suit it ought not to do so under the circumstances of the case. *In re Cooper*, 16 B. R. 178.

An injunction to restrain the prosecution of an action against the bankrupt in the State court, during the pendency of a composition, is proper where installments of the composition have been tendered to the creditors, and the bankrupt is not permitted to plead the composition as a bar to the action. *In re Shafer & Wesselhoefft*, 17 B. R. 116.

Where the party in possession claims title to the property, the inability of the assignee to give the requisite bonds in an action of replevin will not entitle him to an injunction to prevent its removal. *In re The Oregon Iron Works*, 17 B. R. 404.

Where a voluntary assignment for the benefit of creditors has been executed by the bankrupts less than three months before the commencement of proceedings; and where pending the proceedings and pending a proposed composition, and before the election of an assignee, a creditor had brought suit in the State court to compel the voluntary assignee to account, and had obtained the appointment of a receiver; and where an assignee in bankruptcy was subsequently elected, and the composition was subsequently amended so as to provide that the assignee in bankruptcy should take possession of the estate in the hands of the voluntary assignee; and where a reference had been ordered by the bankruptcy court to determine how much, if anything, should be allowed to the creditor who had brought the suit toward reimbursing his expenses in such suit: *Held*, that such creditor would not be allowed to apply to the State court for an order directing the payment out of the estate in the hands of the voluntary assignee of the referee's fees incurred in such action (Law of 1867.) *In re Dumahaut & Co.*, 17 B. R. 517.

It is within the power and duty of the court to set aside summarily any process obtained by fraud and deception practiced upon itself; the exercise of this power is essential to the administration of justice. Where verified petitions are presented, and the petitioners know facts sufficient to put them on inquiry, and such verifications are false, the petitions will be summarily dismissed, and all concerned in preparing and presenting

them will be subject to the grave consequences which result from the practice of fraud and deception on the court. In *re Keller*, 17 B. R. 10.

Copetitioners can not be held innocent of and not privy to the fraud and falsehood practiced in their name by their copetitioners, unless their innocence clearly appears. Petitions in bankruptcy proceedings are to be considered as the joint act of all the petitioners. *Ibid*.

The injunction order issued on a creditor's petition should conform to the language of the statute. *Ibid*.

Under the law of 1867, the debtor filed a voluntary petition in bankruptcy, but objected to being adjudged bankrupt thereon, and no adjudication was ever made. At the time of filing such petition, he also filed a petition for composition, which was adopted and confirmed by the requisite number of creditors. Prior to the conclusion of the creditor's meeting, an opposing creditor commenced action on a provable debt described in the debtor's statement, and levied an attachment upon his goods. On application for an injunction to restrain such action pending the proceedings in composition: *Held*, that the debtor is in no position to appeal to the court for protection as long as he objects to being a bankrupt, and declines to surrender himself to the court. In *re Tiffit*, 18 B. R. 78.

In pursuance of the terms of a resolution of composition, under the law of 1867, as amended, an ex parte order was obtained from the State court discharging the voluntary assignee in so far as the decree confirming the composition affected the rights of creditors, and the assignee thereupon delivered the property and books to the debtors. Subsequently a creditor who had refused to accept the composition notes and whose debt had been contracted by fraud on the part of one of the debtors, moved in the State court for an inspection of the books and to vacate the order discharging the assignee. *Held*, that the action of the creditor was a violation of the composition-agreement, and under the power given the bankruptcy court to enforce the agreement such action must be enjoined. In *re Rodger*, 18 B. R. 381.

Where assignee chosen had been for several years bookkeeper of one of the bankrupts, and said bankrupt and his attorney endeavored to control action of meeting in electing him, and both voted for him on powers of attorney, confirmation was refused, although election was almost unanimous; as it appeared that a large number of creditors were not and could not under the law be represented at the meeting. In *re Wetmore & Bro.*, 16 B. R. 514.

The judge is bound to see that rights of minority are protected and to refuse confirmation when he has good reason to suspect the assignee has been chosen in interest of bankrupt, or if circumstances are such as to indicate that the election was not a fair one. *Ibid*.

When creditors are spoken of "who claim a debt or demand under the bankruptcy," the meaning is that they are creditors of the bankrupt, and that their debts constitute present subsisting claims upon the bankrupt's estate, notwithstanding in fact or in law, and capable of being asserted under the bankruptcy in any manner and form, whether they have a security by way of pledge or mortgage therefor, or not. The clause is



not limited to creditors who prove their debts. In *re William Christy*, 3 How. 292.

This clause does not confer jurisdiction on any subject not pointed out in the statute as a part of the proceedings in bankruptcy from its inception to its close. It refers to matters and proceedings as the successive steps to be taken in the progress of the application according to the directions of the statute, over all which it gives plenary jurisdiction; yet it does not give jurisdiction over all persons and things which may be affected by the proceedings in bankruptcy. In *re Dudley*, 1 Penn. L. J. 302.

The object of these clauses is to give the district court complete jurisdiction to accomplish of itself all the purposes of the law, and to enable it, independently of any other jurisdiction, to begin, continue and end all such proceedings as may be necessary and proper to accomplish the entire settlement and final distribution of the bankrupt's estate. *Mitchell v. Manuf. Co.*, 2 Story, 648; in *re William Christy*, 3 How. 292.

The jurisdiction vested in the district court is ample, and reaches every possible controversy which can arise in the collection and distribution of the effects of a bankrupt. *Buckingham v. McLean*, 3 McLean, 185; s. c. 13 How. 151.

The district court is vested with full chancery and common-law powers to act in all cases arising under the bankruptcy law. *Ibid.*

This section confers jurisdiction to entertain suits for the adjustment of all adverse claims and the collection of outstanding debts. *Mitchell v. Manuf. Co.*, 2 Story, 648.

The district court has jurisdiction of an action at law to collect a debt due to the bankrupt's estate. *Kelly v. Smith*, 1 Blatch. 290; *Atkinson v. Purdy*, Crabbe, 551.

The jurisdiction does not depend on the parties to the suit, but on the subject-matter. *Ibid.*

The district court has jurisdiction to entertain a bill filed by a mortgagee against an assignee of the mortgagor to reform a mortgage which by mistake does not conform to the intention of the parties. *Fowler v. Hart*, 13 How. 373.

Subsequent mortgagees, as well as the assignee, should be made parties to a bill to reform a mortgage. *Fowler v. Hart*, 13 How. 373.

The bankruptcy court has precisely the same powers in equity over judgments of State courts affecting the bankrupt's estate, as a State court of equity would have under a general creditor's bill, if the debtor were not a bankrupt. *Fowler v. Dillon*, 12 B. R. 308.

The bankruptcy court has the power to reduce the amount of a judgment at law rendered on Confederate contracts to its equivalent in legal money. *Ibid.*

The bankruptcy court may require the abatement of war interest embraced in a judgment. *Ibid.*

This clause does not confer or take away jurisdiction of the State courts, but simply allows the Federal courts to decline to entertain actions at common law to which the assignee is a party in which the debt demanded is less than \$500. *Goodrich v. Wilson*, 14 B. R. 555; s. c. 119 Mass. 429.

**Injunctions from District Courts.**—The district court can not restrain the State courts, but it can restrain parties litigant in the State courts, whenever it becomes necessary in order to give force and effect to the jurisdiction and powers conferred upon it by the bankruptcy act. In *re* William Christy, 3 How. 292; *Irving v. Hughes*, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451; *Jones v. Leach et al.*, 1 B. R. 595; *Hyde v. Bancroft*, 8 B. R. 24; s. c. 6 Ben. 392; *Pennington v. Sale & Phelan et al.*, 1 B. R. 572; *Pennington v. Lowenstein et al.*, 1 B. R. 570; in *re* Schnepf, 1 B. R. 190; s. c. 2 Ben. 72; in *re* Bowie, 1 B. R. 628; s. c. 1 L. T. B. 97; s. c. 15 Pitts. L. J. 448; in *re* R. R. Atkinson, 7 B. R. 143; s. c. 5 L. T. B. 320; s. c. 4 C. L. N. 359; s. c. 19 Pitts. L. J. 188. Contra, in *re* Campbell, 1 B. R. 165; s. c. 1 Abb. C. C. 185; s. c. 1 L. T. B. 30; s. c. 6 Phila. 445; in *re* Burns, 1 B. R. 174; s. c. 7 A. L. Reg. 105; s. c. 6 Phila. 448; *Clark v. Binninger*, 3 B. R. 518; s. c. 38 How. Pr. 341; s. c. 3 L. T. B. 49; Tenth Nat'l. Bank v. Sanger, 42 How. Pr. 179; in *re* Dudley, 1 Penn. L. J. 302.

Such a course is very familiar in courts of chancery in cases where a creditor's bill is filed for the administration of the estate of a deceased person, and it becomes necessary or proper to take the whole assets into the hands of the court for the purpose of collecting and marshaling the assets, ascertaining and adjusting conflicting priorities and claims, and accomplishing a due and equitable distribution among all the parties in interest in the estate. In *re* William Christy, 3 How. 292.

Congress, in the enactment of laws upon the subject of bankruptcies, has complete and plenary power, unrestricted save as to uniformity. It has, in legislating upon the subject, power to take from State courts the administration of remedies for the enforcement of liens. The bankruptcy law is, then, the supreme law of the land, binding alike upon Federal and State tribunals, and wherever, by express words or by necessary implication, it affects State laws, the power of State courts or the remedies of suitors therein, it is paramount. When Congress delegated to the district courts the equitable jurisdiction in bankruptcy over the property of the debtor, it by necessary implication also delegated at the same time the power to administer such remedies known to the law as are absolutely indispensable to the complete exercise of the jurisdiction expressly conferred. One power directly given is the power to collect all the assets. The means by which this result is to be reached are not enumerated, but power to accomplish the result is given and the right to employ the proper legal process for affecting the result must follow by necessary implication. Closely connected with the power of collecting the assets is that of ascertaining and liquidating the liens which may be claimed to exist upon those assets. A proceeding to ascertain or liquidate a lien would be idle, unless the court has the power to restrain the parties from liquidating their liens without its intervention, and to preserve the property by restraining its sale until the lien is ascertained to be good or void. The bankruptcy law is highly remedial, and ought to have a liberal construction for the purpose of affecting its aim and policy. It gives the bankruptcy court an exclusive and original jurisdiction over all the parties to the bankruptcy proceedings, all the assets, and all the liens thereon. The express grant

of power to enjoin in proceedings in invitum is not a denial of such power in voluntary proceedings, upon the maxim *expressio unius exclusio alterius*. The district court is clothed at once, in voluntary cases, with jurisdiction over the debtor and his property; but where the proceeding is involuntary, the debtor is not adjudged a bankrupt until the return and hearing of the order to show cause. There is, therefore, good reason for giving the court power to enjoin between the time of filing the creditor's petition and the return of the order to show cause, as there is in these cases no voluntary surrender of the property. In *re Mallory*, 6 B. R. 22; s. c. 1 Saw. 88; s. c. 2 L. T. B. 247; in *re Lady Bryan Mining Co.*, 6 B. R. 252; *Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372; in *re Ulrich et al.*, 8 B. R. 15; s. c. 6 Ben. 483.

It makes no difference with the power of the court over the subject that the lien, or alleged lien, is inchoate and incapable of execution until the amount secured thereby is ascertained and settled. Ascertainment and liquidation are expressly authorized, and the subsequent provisions of the act show how fully the whole administration of the estate is confided to the court. *Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372.

All the creditors of the bankrupt, secured as well as unsecured, become, and are at once, by virtue of the bankruptcy, parties to the proceedings, and they and their debts are thereby brought under and are subject to the sole and exclusive jurisdiction and control of the bankruptcy court. Such jurisdiction and control exist and may be enforced as well before as after proof of debt. *Phelps v. Sellick*, 8 B. R. 390; *Watson v. Citizens' Savings Bank*, 11 B. R. 161.

It does not necessarily follow that the district court must in all cases prohibit any proceeding in a State court for the benefit of a creditor having a lien. Often it is quite convenient, and ordinarily it may be quite desirable to permit pending actions to proceed so far as to ascertain the amount due. In one case a foreclosure of a mortgage in the State court was permitted, though begun after petition filed in the district court. *Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372.

The power to control creditors in respect to the liquidation of liens is clearly given. Two considerations illustrate the importance of the power which are especially applicable to liens by attachment: 1st. Without such power there is no adequate protection to the other creditors against collusion between the bankrupt and the claimant, not even aided by the authority given to the assignee to defend. 2d. The early settlement of the estate may sometimes require that the court in bankruptcy should take the determination of claims which are in dispute into its own hands. *Ibid.*

The power to liquidate the liens upon the assets necessarily includes the power to ascertain what liens there are, their amount, and to pay them off, and as an incident to payment and distribution, a power of sale for their conversion into cash in order that the liens may be liquidated or paid, and the surplus carried to the general fund. In *re Ellerhorst et al.*, 7 B. R. 49; s. c. 2 Saw. 219.

Where the property of the bankrupt is invested in the name of a party, he may be restrained from transferring or disposing of the same. *Keenan v. Shannon*, 9 B. R. 441; s. c. 31 Leg. Int. 85.

Where a levy has been made before the commencement of proceedings in bankruptcy, the possession of the sheriff can not be disturbed by the assignee. The latter, in such case, is only entitled to such residue as may remain in the sheriff's hands after the debt for which the execution issued has been satisfied. *In re David Weamer*, 8 B. R. 527; s. c. 21 Pitts. L. J. 17; 30 Leg. Int. 321; 6 C. L. N. 27; *Marshall v. Knox*, 8 B. R. 97; s. c. 16 Wall. 551; *Peck v. Jenness*, 7 How. 612; *Colby v. Ledden*, 7 How. 626; *In re John Kerlin*, 3 How. 326.

This doctrine, however, has no application where the pending suits are in the Federal tribunals. There no comity is violated. *Sutherland v. Lake Superior Canal Co.*, 9 B. R. 208; s. c. 1 Cent. L. J. 127.

If the execution creditor has security on real estate as well as on personal property, he may be enjoined for a brief period, to allow the creditors to pay him and obtain a transfer of his judgment, or to enable them to obtain such other equitable relief as may not impair his rights. *Eastburn v. Yardley*, 8 Pac. L. R. 127; s. c. 30 Leg. Int. 404.

Where the judgment was obtained in fraud of the bankruptcy law, the bankruptcy court may enjoin a sale under an execution issued thereon. *Sutherland v. Lake Superior Canal Co.*, 9 B. R. 208; s. c. 1 Cent. L. J. 127; *In re Wm. H. Shuey*, 9 B. R. 526; s. c. 6 C. L. N. 248; *Buckingham v. McLean*, 3 McLean, 185; s. c. 13 How. 151. *Contra*, *Townsend v. Leonard*, 2 Dillon, 370.

The district court can not order the property to be taken out of the hands of the sheriff until the levy under the execution is set aside on account of fraud, or for the reason that it is in violation of the bankruptcy law. The assignee has no right to the immediate possession of the property seized before the judgment is satisfied. *In re Wm. H. Shuey*, 9 B. R. 526; s. c. 6 C. L. N. 248.

The lien under an execution is *prima facie* valid. *Ibid.*

An injunction which merely restrains the sheriff from disposing of the bankrupt's property does not prevent a sale of property levied on before that time, for such property is not the bankrupt's property in law except so far as the surplus is concerned. *Ansonia B. & C. Co. v. Babbitt*, 15 N. Y. Supr. 157.

If an injunction merely restrains the sheriff from disposing of the property, this does not justify him in releasing it from the levy. *Ibid.*

The court may, in its discretion, before granting an injunction against a judgment creditor who has a lien, require the general creditors to indemnify the judgment creditor. *In re Donaldson*, 1 B. R. 181; s. c. 1 L. T. B. 5; s. c. 7 A. L. Reg. 213; s. c. 6 Phila. 143.

After the process of the State court has been executed, and the property sold thereon, it is too late to interfere. The purchaser at such sale acquires a good title, and this is so even if the judgment is fraudulent, provided the purchaser is an innocent one. For this reason, as well as upon general principles, the district court can not set aside a sale upon

the process of a State court, and order the property resold, however apparent it may be that it was sold much below its real value. The remedy is in the State court, upon objections to the confirmation of the sale. *In re Fuller*, 4 B. R. 115; s. c. 1 Saw. 243; *Thames v. Miller*, 2 Woods, 564.

If several executions are levied upon the same property, an agreement among the execution creditors to bid the property in for their joint benefit will not render the sale fraudulent if it were fairly conducted and the property brought all it was reasonably worth. *Thames v. Miller*, 2 Woods, 564.

Where property of the bankrupt has been sold by the sheriff under an execution issued upon a valid judgment in a State court, the injunction will not be granted. The sheriff will be allowed to use the proceeds to satisfy the judgment and all costs thereon, and will only be required to account for the balance to the proper officer of the bankruptcy court. *In re Campbell*, 1 B. R. 165; s. c. 1 Abb. O. C. 185; s. c. 1 L. T. B. 30; s. c. 6 Phila. 445; *in re Bernstein*, 1 B. R. 199; s. c. 2 Ben. 44.

If an injunction is served on the sheriff, the State court will not direct him to pay the money over to the execution creditor. *Mills v. Davis*, 10 B. R. 340; s. c. 35 N. Y. Supr. 355.

Where an insolvent corporation files a petition in bankruptcy after the filing of a complaint in a State court, but before the appointment of a receiver, and surrenders its assets to the register under an order of the bankruptcy court, the district court may enjoin the complainant in the State court from prosecuting his suit, if the State court, notwithstanding a return of the facts, insists upon proceeding with the suit. *In re Citizens' Savings Bank*, 9 B. R. 152.

When a creditor who is prosecuting a suit in a State court has obtained an agreement by which he will obtain an improper advantage, he may be enjoined from prosecuting his suit. *Sampson v. Burton*, 5 B. R. 459.

When the creditors of the bankrupt will not be benefited, and the party to be enjoined may be materially injured, the injunction will not be granted. *In re Bowie*, 1 B. R. 628; s. c. 1 L. T. B. 97; s. c. 15 Pitts. L. J. 448; *in re Donaldson*, 1 B. R. 181; s. c. 1 L. T. B. 5; s. c. 7 A. L. Reg. 213; s. c. 6 Phila. 143; *in re Wilbur*, 3 B. R. 276; s. c. 1 Ben. 527; s. c. 2 L. T. B. 171; *in re Iron Mountain Co.*, 4 B. R. 645; s. c. 9 Blatch. 320; *in re Irwin Davis*, 4 B. R. 716; s. c. 8 B. R. 167; s. c. 1 Saw. 260; *in re Geo. W. Dillard*, 9 B. R. 8; s. c. 6 L. T. B. 490; *in re William Christy*, 3 How. 292; *Norton v. Boyd*, 3 How. 426; *in re Peter Hufnagel*, 12 B. R. 554.

The fact that steps have been taken to enforce the lien makes no difference. It is not a question of jurisdiction or of right, but of discretion. *In re Geo. W. Dillard*, 9 B. R. 8; s. c. 6 L. T. B. 490.

Proceedings in the State court to punish a party for contempt will not be enjoined. *In re M. W. Hill*, 2 B. R. 140.

An injunction will not be granted to stay proceedings on a suit instituted in a State court against the marshal, for taking possession of property which did not belong to the debtor, under a warrant in involuntary

bankruptcy. In re Marks, 2 B. R. 575; s. c. 1 C. L. N. 245; s. c. 16 Pitts. L. J. 12.

The district court can not enjoin a suit in the State court by a party who claims under a bill of sale voidable by creditors, against a sheriff who has levied an attachment upon the property, and subsequently turned it over to the assignee, because the sheriff has a valid defense which the State courts are ready to uphold. There is no jurisdiction in the district court to try a case between an attaching officer and a stranger to the bankruptcy, or to enjoin such an action in the court which has jurisdiction of it. In re H. S. Evans, Lowell, 525.

If the property which was transferred fraudulently has been seized by the marshal and turned over to the assignee, the circuit court may, as an incident to the relief, restrain the fraudulent grantee from prosecuting suits in the State courts against the assignee and the marshal for such seizure. Kellogg v. Russell, 11 B. R. 121; s. c. 11 Blatch. 519.

The sheriff of the State court may be made a party to the proceedings for an injunction. In re Bernstein, 1 B. R. 199; s. c. 2 Ben. 44; Jones v. Leach et al., 1 B. R. 595; Pennington v. Sale & Phelan et al., 1 B. R. 572; Pennington v. Lowenstein et al., 1 B. R. 570; Wilson v. Brinkman et al., 2 B. R. 468; s. c. 1 C. L. N. 193; in re Mallory, 6 B. R. 22; s. c. 1 Saw. 88; s. c. 2 L. T. B. 247; Warren v. Tenth Nat'l. Bank, 7 B. R. 481; s. c. 10 Blatch. 493; in re Bellows & Peck, 3 Story, 428.

If purchasers are reluctant to take the title, on account of the cloud cast upon it by the pendency of proceedings in bankruptcy, this is a sufficient reason for granting an injunction. Whitman v. Butler, 8 B. R. 487.

If the mortgagee, prior to the commencement of proceedings in bankruptcy, sold the property by virtue of a power contained in the mortgage, but the purchaser refused to accept the title, the bankruptcy court may enjoin the mortgagee from attempting to resell after the commencement of proceedings in bankruptcy, the same as if no sale had ever been made. Ibid.

If the party in possession claims a right to the property, the assignee is not entitled to an injunction to prevent a removal thereof, upon the mere ground that he is unable to give the bond requisite in an action of replevin. In re Oregon Iron Works, 13 Pac. L. R. 50.

An injunction will lie against a party within the jurisdiction of the court to stay proceedings in any court beyond its territorial limits. In re James Martin, 5 Law Rep. 158; Hyde v. Bancroft, 8 B. R. 24; s. c. 6 Ben. 392.

If the party in whose name the legal proceedings sought to be enjoined are conducted does not reside within the district, the injunction may be issued against him, his agents and attorneys within the district, and in such a case the service of the injunction upon such agents or attorneys will be a service upon the principal, and bind him as well as them personally. In re Bellows & Peck, 3 Story, 428.

The district court may, in its discretion, direct notice to be given to the adverse party before the granting of an injunction. In re Moses Carlton, 1 N. Y. Leg. Obs., 291; s. c. 5 Law Rep. 120; in re John Harper Smith,

1 N. Y. Leg. Obs. 291; *Irving v. Hughes*, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451; in re Wallace, 2 B. R. 134; s. c. 1 Deady, 483; in re Muller & Brentano, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33.

Before the appointment of an assignee, proceedings for an injunction to protect the property of the bankrupt may be instituted by the bankrupt, or the petitioning creditors. *Irving v. Hughes*, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451; *Jones v. Leach*, 1 B. R. 595; in re Donaldson, 1 B. R. 181; s. c. 1 L. T. B. 5; s. c. 7 A. L. Reg. 213; s. c. 6 Phila. 142; in re Bowle, 1 B. R. 628; s. c. 1 L. T. B. 97; s. c. 15 Pitts. L. J. 448; in re Isaac Ulrich, 8 B. R. 15; s. c. 6 Ben. 483; in re John S. Foster, 2 Story, 131; in re Bellows & Peck, 3 Story, 428.

As soon as the assignee is appointed, he should be made a party to the proceedings by a supplemental bill. *Irving v. Hughes*, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451.

Where an injunction is obtained upon a petition filed in the cause pending in bankruptcy, it may be dissolved on a motion, without resorting to the formality of a demurrer. In re Wallace, 2 B. R. 134; s. c. 1 Deady, 433; in re E. Mallory, 6 B. R. 22; s. c. 1 Saw. 88; s. c. 2 L. T. B. 247.

An execution creditor, who has been delayed by an injunction, is entitled to a prompt adjudication of the validity of his judgment as soon as an assignee is appointed. The question, however, can not be determined on ex parte affidavits. In re Hafer & Bros. (in re Beck), 1 B. R. 586; s. c. 6 Phila. 474.

When the assignee, after his appointment, does not take possession of property levied on by virtue of an execution issued upon a valid judgment, nor make application for leave to discharge the levy by paying the judgment, and there is no evidence that any advantage will be gained by continuing the injunction, it will be dissolved. In re Wilbur, 3 B. R. 276; s. c. 1 Ben. 527; s. c. 2 L. T. B. 171; in re J. J. Fendley, 10 B. R. 250; s. c. 1 Cent. L. J. 433.

When it does not appear that the proceedings under an execution will affect the interests of any party entitled to the protection of the district court under the bankruptcy act, the injunction will be dissolved. When the bankrupt claims that the property held under an execution belongs to his wife, and the assignee does not assert any claim thereto, the injunction will not be continued. In re Olcott, 2 Ben. 443.

When, in a case in equity in the district court, the weight of evidence is rather with the defendants, and there is no suggestion that they are not abundantly responsible pecuniarily, or that the assets are in peril, the injunction will, on motion, be dissolved, and the case will then go to a final hearing on proofs. *Collins v. Bell*, 3 B. R. 587.

A decree enjoining a judgment creditor and the maker of a note from enforcing a judgment against the bankrupt, does not restrain the maker of the note upon which the judgment was rendered from proceeding ex delicto, at law against the bankrupt for his fraud in disposing of the note. *Horter v. Harlan*, 7 B. R. 238; s. c. 9 Phila. 63.

A party who is served with an injunction restraining him from prosecuting a suit must affirmatively take steps adequate to prevent such pro-

ceedings. It is a grave error to suppose that if he personally takes no steps to go on, he can refrain from taking any reasonably adequate measures to stop the proceedings, and leave it in the power of his employees to go on in his name, and yet escape the consequence of disobeying the injunction. *Hyde v. Bancroft*, 8 B. R. 24; s. c. 6 Ben. 392.

A party who has violated an injunction may be compelled to pay expenses of the proceeding to punish him for contempt, together with a proper fee for the counsel for the complainant. *Ibid.*

If an injunction prohibiting an application for a receiver is served on an attorney while he is engaged before the State court in making the application, he violates it by handing the motion papers with a draft order for the appointment of a receiver to the judge, if the application is granted and a receiver appointed. *In re South Side R. R. Co.*, 10 B. R. 274; s. c. 7 Ben. 391.

**Proceedings in the District Court Sitting as a Court of Bankruptcy.**—An appearance and answer do not waive any question affecting the jurisdiction of the court, for no voluntary act of the defendant can give jurisdiction, and it is never too late, at any stage of the cause, to consider it. *Jobbins v. Montague*, 6 B. R. 509.

Courts of bankruptcy are mere creatures of the statute, and derive all their life and vigor from it. Jurisdiction is only given "in their respective districts." The fair legal inference from these words is that jurisdiction was meant to be withheld outside of those districts. *Ibid.*

The case in bankruptcy includes all the summary proceedings. *Chemung Canal Bank v. Judson*, 8 N. Y. 254.

The whole proceedings in bankruptcy are on the equity side of the court, and whatever a court of equity may do in the exercise of its general jurisdiction over subjects requiring a like interposition, may properly be done by the district court in cases in bankruptcy. *In re Benjamin B. Grant*, 5 Law Rep. 303; *in re Moses Carlton*, 1 N. Y. Leg. Obs. 291; s. c. 5 Law Rep. 120.

Power and jurisdiction in all matters and proceedings in bankruptcy are conferred upon the district courts, and these courts, as courts of bankruptcy, are authorized to hear and adjudicate upon the same, according to the provisions of the bankruptcy act. Examined separately, the clause which provides that the powers and jurisdiction therein granted and conferred may be exercised as well in vacation as in term time, and that a judge sitting in chambers shall have the same powers and jurisdiction as when sitting in court, would seem to afford some support to the view that all the powers and jurisdiction of the district courts when sitting as courts in bankruptcy may be exercised in a summary way as by rule to show cause. Most matters and proceedings in bankruptcy may doubtless be heard and adjudicated by the district court in that way, but this general clause must be considered in connection with all the other provisions of the bankruptcy act. Superadded to the general clause, and as an exposition of the same, is another and more important clause, in which is given a specific enumeration of the cases and controversies to which that general jurisdiction extends, and it is plain that the enumeration does not include



"suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee." Cases of that kind fall directly within section 4997, and must be determined by a suit in equity, or an action at law, as the case may be. *Smith v. Mason*, 6 B. R. 1; s. c. 14 Wall. 419; s. c. 5 L. T. B. 7; *Marshall v. Knox*, 8 B. R. 97; s. c. 16 Wall. 551; *Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205; *Barstow v. Peckham*, 5 B. R. 72; in re Kerosene Oil Co., 3 B. R. 125; s. c. 6 Blatch. 521; *Rogers v. Winsor*, 6 B. R. 246; in re Masterson, 4 B. R. 553; *Shaffer v. Fritchery*, 4 B. R. 548; in re H. S. Evans, Lowell, 525; *Briggs v. Stephens*, 7 Law Rep. 281. Contra, in re Norris, 4 B. R. 35; s. c. 1 Abb. C. O. 514; s. c. 1 L. T. B. 227.

The district court has no jurisdiction or control over a person who is not before the court, and upon whom no process has been served. Such a person is not a party to the proceedings in bankruptcy. *Marshall v. Knox*, 8 B. R. 97; s. c. 16 Wall. 551.

The only parties to the proceedings in bankruptcy are the debtor, his assignee and his creditors. Other persons are not affected by them. *Marsh v. Armstrong*, 11 B. R. 125; s. c. 20 Minn. 81.

Consent can not confer jurisdiction to adjudicate the question of title to property in a summary proceeding. *Marsh v. Armstrong*, 11 B. R. 125; s. c. 20 Minn. 81.

If a stranger to the proceedings appears in answer to a summary petition, and consents to a reference of the case to a register, he can not impeach the decision of the court, in a collateral action, for want of jurisdiction. *People v. Brennan*, 12 B. R. 567; s. c. 6 N. Y. Supr. 120; s. c. 10 N. Y. Supr. (Hun) 66.

If the execution creditor, who is restrained on a summary petition, appears and asks for an order directing the sheriff to sell the property and bring the proceeds into the bankruptcy court, he can not maintain an action against the sheriff to recover the proceeds after the latter has complied with this order. *O'Brien v. Weld*, 15 B. R. 405; 92 U. S. 81.

If a creditor claims that a sale of his claim is void, on account of fraud, the controversy may be determined by the bankruptcy court that has control of the fund. *Frank v. Tolman*, 75 Ill. 648.

The assignee, who is an officer of the bankruptcy court, may be proceeded against by summary petition in respect to any funds in his hands if the opposing party chooses to proceed in that way, though the assignee himself has no right to take similar action against third persons. In re H. S. Evans, Lowell, 525; *Ferguson v. Peckham*, 6 B. R. 569; s. c. 29 Leg. Int. 285.

The court can not deprive the assignee of the possession of the property of the bankrupt without due process of law, which in general means a trial by jury unless the parties consent to a trial by the court. *Wood M. & R. Co. v. Brooke*, 9 B. R. 395.

When the assignee denies the validity of the claim, and asserts title to the property, the claimant can not proceed by a summary petition. *Hurst v. Teft*, 13 B. R. 108; s. c. 12 Blatch. 217.

Where the bankrupt holds property to secure him for indorsements and notes, made by him for the owner, the holder of one of these notes is not entitled to a summary order, directing the payment of his claim out of the property. *Ibid.*

Whatever powers are given by this section are designed to be exercised summarily. When the property affected by a lien is confessedly the property of the bankrupt, and has passed to the assignee, and it only remains to ascertain and liquidate the alleged lien, the summary jurisdiction of the district court is entirely adequate. *Samson v. Clarke*, 6 B. R. 403; a. c. 9 Blatch. 372; *in re Isaac Ulrich*, 8 B. R. 15; s. c. 6 Ben. 483.

When the claimant of property in the possession of the assignee invokes the controlling power of the court over the assignee as its officer, and submits to a trial of the question which he asks the court to determine, no question can be raised whether a more formal suit would or would not have been proper. *Samson v. Blake*, 6 B. R. 410; s. c. 9 Blatch. 379.

When a party voluntarily appears, and moves for the enforcement of a pretended lien, the district court thereby acquires jurisdiction to proceed and dispose of the whole matter in a summary way. *In re Worthington*, 14 B. R. 388; s. c. 8 C. L. N. 362; s. c. 3 Cent. L. J. 526; s. c. 9 C. L. N. 346.

The district court is legislatively made a court of summary equitable jurisdiction over the assignee and over his trust. Therefore, independently of any special provisions of the bankruptcy act, the court can, by way of direction to him, decide any question of legal or equitable right which can be contentiously discussed for opposing interests. *In re Franklin Fund Saving Society*, 31 Leg. Int. 173.

A petition to have an order for a sale of property declared null and void, should make the purchaser and those claiming under him parties to the proceeding. *In re Wm. Major*, 14 B. R. 71.

The assignee may proceed by a summary petition, to have an order for a sale of property declared null and void. *Ibid.*

The power to issue an injunction to prevent parties from interfering with the property of the bankrupt, may be exercised summarily without a formal suit. *In re Isaac Ulrich*, 8 B. R. 15; s. c. 6 Ben. 483.

If the wife for a debt due to her take a note payable to her husband or bearer, the court will not, in a summary and incidental manner, interfere with the assignee's right to the possession of the property. *In re George W. Snow*, 1 N. Y. Leg. Obs. 264; s. c. 5 Law Rep. 369.

Jurisdiction to order a foreclosure in favor of an alleged mortgagee claiming adversely to the assignee and adversely to another mortgagee, where the title of the applicant is disputed, the amount claimed to be due is denied, and where it is insisted that he has already released the lien, is not embraced in the summary jurisdiction. *In re Edward A. Casey*, 8 B. R. 71; s. c. 10 Blatch. 376.

Jurisdiction to foreclose mortgages upon the estate of the bankrupt is not included in the powers to be exercised summarily. *Ibid.*

The bankruptcy court has jurisdiction over a summary petition to compel the bankrupt to deliver property in the joint possession of himself and wife to the assignee, unless it is shown that she has an adverse interest in the property. *In re Pierce & Whaling*, 15 B. R. 449; s. c. 9 C. L. N. 300.

The bankruptcy court has no jurisdiction to entertain a summary petition by a creditor against the assignee for a sale of property not in the possession of the assignee but in the possession of another claiming title and not a party to the petition. *Bradley v. Healey*, 1 Holmes, 451.

When a bill in equity is pending between the parties in which a right to a set-off is at issue, the proceedings on a petition of a creditor against the assignee for the ascertainment of his claim, may be stayed to abide the event of that suit. *Ibid.*

The court in a summary proceeding may direct the sale of property free from all incumbrances, although the assignee disputes the validity of a mortgage thereon. The right of the mortgagee is not affected thereby. His lien, if any he has, is transferred to the fund, and must be asserted, and, if contested, settled in an appropriate proceeding to be subsequently taken. *In re Frederick S. Kirtland*, 10 Blatch. 515.

If the attorney of the mortgagee appears and answers the petition, the court has jurisdiction to direct a sale of the property free from incumbrances. *Ibid.*

The grant of jurisdiction to collect the assets impliedly confers upon the courts of bankruptcy the right to adopt such form of proceeding as may be necessary and appropriate to give practical efficiency to such grant. This is a universal rule of construction, and without such a rule, many rights would go unredressed; for it is not unusual for legislative bodies to leave with the courts the power to devise and adopt a remedy commensurate with the exigencies of the case, in the execution of the authority conferred; the restriction being that they must not be such as are in violation of the provisions of the fundamental law, or in derogation of the constitutional rights of the citizen. *Goodall v. Tuttle*, 7 B. R. 193; *a. c.* 3 Biss. 219.

Jurisdiction over the debtors and adverse claimants is not obtained by the bankruptcy proceedings, and they can not be treated as parties to the proceedings like creditors. The power to collect the assets is, therefore, necessarily an additional and independent authority. *Ibid.*

The fullest and most comprehensive authority is given to the district court in respect to all matters relating to a proceeding in bankruptcy. The power is in its nature an equity power, and may be exercised by proceedings in the nature of equity proceedings. It is undoubtedly the object and policy of the bankruptcy act, that proceedings under it shall be summary; that matters shall be settled as speedily as possible. In no other way can the bankruptcy system be put into operation without interminable doubts, controversies, embarrassments, and difficulties, or in such a manner as to achieve the true end and design thereof. Its success is dependent upon the national machinery being made adequate to all the exigencies of the act. Prompt and ready action can be safely relied on where the whole jurisdiction is confided to a single court: in the collection of assets; in the ascertainment and liquidation of liens and other specific claims thereon; in adjusting the various priorities and conflicting interests; in marshaling the different funds and assets; in directing the sales at such times and in such manner as shall best subserve

the interests of all concerned; in preventing, by injunction or otherwise, any particular creditor or person having an adverse interest, from obtaining an unjust and inequitable preference over the general creditors by an improper use of his rights or remedies in the State tribunals; and, finally, in making a due distribution of the assets, and bringing to a close within a reasonable time the whole proceedings in bankruptcy. *Bill v. Beckwith*, 2 B. R. 241; in *re Wallace*, 2 B. R. 134; s. c. 1 *Deady*, 433; in *re Kerosene Oil Co.*, 2 B. R. 528; s. c. 3 *Ben.* 35; s. c. 2 *L. T. B.* 79; in *re J. O. Smith*, 2 B. R. 297; in *re Marks*, 2 B. R. 575; s. c. 1 *C. L. N.* 245; s. c. 16 *Pitts. L. J.* 12; in *re People's Mail Steamship Co.*, 2 B. R. 553; s. c. 3 *Ben.* 226; in *re Geo. J. G. Davidson*, 2 B. R. 114; s. c. 2 *Ben.* 506; in *re Vogel*, 2 B. R. 427; s. c. 3 *B. R.* 198; s. c. 7 *Blatch.* 18; s. c. 2 *L. T. B.* 154; *Foster v. Ames*, 2 B. R. 455; s. c. *Lowell*, 313; in *re Josiah D. Hunt*, 2 B. R. 539; s. c. 1 *C. L. N.* 169.

This power is not a wanton power. It is not a power to order this or that because it may. It is a judicial discretion to be carefully exercised in view of the rights of all; to be exercised so far as may be in accordance with sound precedent, and is so to mold itself to, and meet the necessarily new questions, not of practice alone, but of right, as they arise, that while, on the one hand, it administers the law in the true intent and spirit of its enactment, so as to effectuate the really equitable and beneficial ends it seeks to attain, it does not, on the other, abrogate those useful and striking analogies so well known to the profession, nor those rules of practice and judicial procedure now so interwoven with our system of jurisprudence as to have become an almost inherent and essential part thereof. Hence, in its discretion, the court may require parties to resort to more formal proceedings, where no loss or detriment will be occasioned thereby. In *re Josiah D. Hunt*, 2 B. R. 539; s. c. 1 *C. L. N.* 169; *Bill v. Beckwith*, 2 B. R. 241; in *re Betts*, 15 B. R. 536; s. c. 4 *Cent. L. J.* 558; s. c. 13 *Pac. L. R.* 203.

Strangers to the proceedings in bankruptcy, not served with process, and who have not voluntarily appeared and become parties to such litigation, can not be compelled to come into court, under a petition for a rule to show cause. *Smith v. Mason*, 6 B. R. 1; s. c. 14 *Wall.* 419; s. c. 5 *L. T. B.* 7; *Marshall v. Knox*, 8 B. R. 97; s. c. 16 *Wall.* 551.

An appearance by attorney is effective to give jurisdiction over a party, even though there has been no previous service of process upon him. The object of process in a suit in personam is to secure the appearance of the party, and his general appearance waives all irregularities in the service of such process, and confers jurisdiction so far as the person is concerned. That jurisdiction, when once thus conferred, can not be withdrawn by the act of the party who has so appeared, without the consent of the court or of the prosecuting party. If the right to withdraw depends upon questions of fact, the court will pass upon the existence and pertinence of the facts, and allow or refuse the withdrawal on previous notice to the prosecuting party. In *re Ulrich et al.*, 3 B. R. 133; s. c. 3 *Ben.* 355.

When property is sold under an agreement that the proceeds shall be brought into court, they are paid into the registry, and the court is its

legal and only custodian. The fund is lodged in court without prejudice to the rights of any of the parties, and it is an essential part of the agreement between the parties in legal intendment that their claims shall be adjudicated by the court according to the law and usage of the court in cases of deposits in its registry. Either party can, at any time, by petition or motion, prefer his claim to it, whereupon it will become the court's duty, causing proper notice to be given to whomsoever it may deem proper, to act upon such petition or motion. The dismissal of it will not necessarily establish the title of any contesting party. The court may well adjudge that one petitioner has failed to establish his right, and dismiss his petition, retaining custody of the fund until some other petitioner, it may be a second or it may be a fiftieth, shall establish his right satisfactorily to the court. *In re Masterson*, 4 B. R. 553.

An application to the summary jurisdiction of the court to be exercised by an order to show cause, as upon a motion, is not a suit, and can not be treated as a suit. *In re Edward A. Casey*, 8 B. R. 71; s. c. 10 Blatch. 376.

The objection that the proceeding should be by a bill in equity, or an action at law, may be taken at the hearing, or in the appellate court. *In re Bonesteel*, 3 B. R. 517; s. c. 7 Blatch. 175; *in re Ballou*, 3 B. R. 717; s. c. 4 Ben. 135. *Contra*, *in re Ulrich et al.*, 3 B. R. 133; s. c. 3 Ben. 355.

The petition may be converted into a bill in equity, but the only advantage to be gained by so doing will be a saving of the service of a new subpoena, as the answers filed and the testimony taken, if any, can not be used, except by consent, in the prosecution of the suit in its amended form. *In re Kerosene Oil Co.*, 3 B. R. 125; s. c. 6 Blatch. 521; *Barstow v. Peckham*, 5 B. R. 72; *Starkweather v. Cleveland Ins. Co.*, 4 B. R. 341; s. c. 2 Abb. C. C. 67; *in re H. S. Evans*, Lowell, 525.

When a party has made a mistake in selecting his remedy, the summary petition may, in the discretion of the court, be dismissed without costs to either party, with leave to the petitioner to pursue the appropriate remedy. *In re Bonesteel*, 3 B. R. 517; s. c. 7 Blatch. 175; *in re Ballou*, 3 B. R. 717; s. c. 4 Ben. 135.

The summary jurisdiction may be exercised upon the ordinary processes, orders to show cause, notices of motions, etc., therein, or upon petitions where special aid or relief is sought in any matter embraced in that jurisdiction. *In re Edward A. Casey*, 8 B. R. 71; s. c. 10 Blatch. 376.

A party seeking relief in the bankruptcy court should come in by petition and not by motion. The petitioner should sign and verify the petition. Coming into court as he does, in an original manner, seeking affirmative relief, and not brought in by another party, he must come in in person in the first instance, and not by an attorney. *In re J. O. Smith*, 2 B. R. 297; *in re Davidson*, 2 B. R. 114; s. c. 2 Ben. 506; *in re Philo R. Sabin*, 9 B. R. 383.

The oath to a petition must be administered by the same officers and in the same manner as oaths in other cases to be used in the courts of the United States. *In re Philo R. Sabin*, 9 B. R. 383.

When the oath is administered by a notary public, the signature and notarial seal of the notary constitute a sufficient authentication. When not accompanied by such seal, the signature and official character of the notary must be authenticated in the usual manner. *Ibid.*

It is not necessary or proper that resort should be had to the formal and plenary proceedings common to suits in equity in the circuit court. A petition stating the facts relied on for relief, and praying for the order, relief, or proceeding sought for, is sufficient. *In re Wallace*, 2 B. R. 134; s. c. 1 Deady, 433; *in re J. O. Smith*, 2 B. R. 297.

When the district court has jurisdiction of the subject-matter and of the question at issue, and both parties submit themselves to its exercise and invoke it in the form of a summary proceeding, the court is not called upon to consider whether the determination of the question should have been sought by a summary proceeding or by a proceeding more formally commenced. *Samson v. Blake*, 6 B. R. 410; s. c. 9 Blatch. 379.

If the adverse party goes to a hearing without objecting to the right or interest of the petitioner, this is a waiver of the form of filing a new petition to set up an interest subsequently acquired. *In re Robert Morris Crabbe*, 70.

A summary petition is not like a suit at common law, in which the party must have his right of action when he commences it. If he subsequently acquires an interest, he may file a new petition. *Ibid.*

If the assignee is not chargeable with a personal knowledge of the subject, his omission to deny an averment will not enable the petitioner to use it as if admitted. *In re George W. Snow*, 1 N. Y. Leg. Obs. 264; s. c. 5 Law Rep. 369.

A party who acquiesces in a reference to an auditor, and appears before him and contests the claim, waives the right to a jury trial. *Kelly v. Smith*, 1 Blatch. 290.

If the district judge shall be satisfied, in conducting such a proceeding, that justice will be subserved by a jury trial, he can direct the issue to be so tried. *Bill v. Beckwith*, 2 B. R. 241.

When a petition is filed claiming rent for possession of premises by the assignee after the commencement of the proceedings in bankruptcy, a jury trial may be allowed. *Buckner v. Jewell*, 14 B. R. 286; s. c. 2 Woods, 220.

The testimony may be taken *ore tenus* at the hearing. *Wilson v. Stoddard*, 4 B. R. 254; s. c. 2 C. L. N. 161.

If the mortgagee is dead, the mortgagor can not testify in favor of his assignee in a proceeding against the executors of the mortgagee. *Bromley v. Smith*, 5 B. R. 152; s. c. 2 Biss. 511.

The declarations of the bankrupt in aid and in partial execution of a transfer which is impeached, are admissible as the declarations of a co-conspirator and as a part of the *res gestae*. *Samson v. Clarke*, 6 B. R. 410; s. c. 9 Blatch. 379.

Even in a formal suit in equity the court may qualify the decree so that it shall not operate to prevent a new suit, and nothing is more common in disposing of motions than to give leave to renew or apply upon new

and further evidence for additional relief. The highly equitable and remedial powers conferred upon the court in bankruptcy are not less free from restriction, nor are they hampered by such technical rules as will prevent the doing of what is just and for the protection of the estate, even if it required the revocation of an order once made. An order dismissing a petition with leave to renew the application upon the discovery of additional facts, is not final and conclusive as *res adjudicata*. *Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372.

Where property has been delivered to the plaintiff in a replevin suit brought in a State court, and has been subsequently taken from the possession of the plaintiff by the marshal, there is no conflict or interference on the part of the marshal with the officers of the State court. *In re Geo. J. G. Davidson*, 2 B. R. 114; s. c. 2 Ben. 506.

Where a petition assumes the form of a regular suit or proceeding, and testimony is introduced as upon an ordinary trial, a docket fee of twenty dollars may be taxed in favor of the attorney for the assignee when the petition is dismissed. *In re Bank of Madison*, 9 B. R. 184; s. c. 5 Biss. 515.

**Jurisdiction of State Courts over Suits by Assignees.**—The jurisdiction of the district court is not exclusive over the entire execution of the law. *Lucas v. Morris*, 1 Paine, 396.

Congress has no right to require that the State courts shall entertain suits for the purpose of carrying out the provisions of the bankruptcy law. The States in providing their own judicial tribunals have a right to limit, control and restrict their judicial functions and jurisdiction according to their own mere pleasure. *Mitchell v. Manuf. Co.*, 2 Story, 648; *Buckingham v. McLean*, 3 McLean, 185; s. c. 13 How. 151.

An assignee under the bankruptcy law of the United States may sue in his own name in the State courts to enforce the rights of property vested in him by the assignment in bankruptcy, and the courts of the United States have not exclusive jurisdiction of such actions. *Stevens v. Mechanics' Savings Bank*, 101 Mass. 109; *Pelper v. Harmer*, 5 B. R. 252; s. c. 8 Phila. 100; s. c. 4 L. T. B. (C. R.) 166; *Boone v. Hall*, 7 Bush, 66; *State v. Trustees*, 5 B. R. 466; *in re Central Bank*, 6 B. R. 207; *Cogdell v. Exum*, 10 B. R. 327; s. c. 69 N. C. 404; *Hoover v. Robinson*, 3 Neb. 437; *Mitchell v. Manuf. Co.*, 2 Story, 648; *Hastings v. Fowler*, 2 Ind. 216; *Ward v. Jenkins*, 51 Mass. 583; *Russell v. Owen*, 15 B. R. 322; s. c. 61 Mo. 185. *Contra*, *Frost v. Hotchkiss*, 14 B. R. 443; s. c. 1 Abb. N. C. 27.

In an action brought by an assignee, the defendant may deny the jurisdiction of the district court over the bankrupt in the proceedings in which the assignee was appointed. *Stuart v. Aumüller*, 8 B. R. 541.

The State courts have jurisdiction of questions arising between persons within their jurisdiction, whether they arise under the laws of any other State or any foreign nation. If they arise under the law of the United States, they have the same jurisdiction, unless deprived of it by some competent authority. The fact that the Federal courts may have jurisdiction of the same question, does not deprive the State courts of jurisdiction. The Federal and State courts may and do have concurrent

jurisdiction of various questions. When, however, the right of action is created by an act of Congress, it being a matter within the power conferred upon the Federal government, Congress may prescribe, in the exercise of its rightful powers, the manner and the tribunal in which alone that right may be enforced. Congress may confer exclusive jurisdiction in these cases upon the Federal courts; but when it does not prescribe the tribunal in which alone they are to be prosecuted, the Federal and State courts have concurrent jurisdiction over them. The fact that Congress confers jurisdiction upon the Federal courts, is no evidence that Congress intended to clothe them with exclusive jurisdiction, because they have no jurisdiction except such as is conferred upon them by Congress. *Cook v. Whipple*, 9 B. R. 155; s. c. 55 N. Y. 150; *Gilbert v. Priest*, 8 B. R. 159; s. c. 63 Barb. 339; s. c. 65 Barb. 444; s. c. 14 Abb. Pr. (N. S.) 165; *Gilbert v. Crawford*, 46 How. Pr. 222; *Jordan v. Downey*, 12 B. R. 427; s. c. 40 Md. 401; *Lewis v. Sloan*, 68 N. C. 557; *Dambmann v. White*, 12 B. R. 438; s. c. 48 Cal. 439; *Kemmerer v. Tool*, 12 B. R. 334; s. c. 78 Penn. 147; *Otis v. Hadley*, 112 Mass. 100; *Rison v. Powell*, 28 Ark. 427; *Clafin v. Houseman*, 15 B. R. 49; s. c. 93 U. S. 130; *Goodrich v. Wilson*, 14 B. R. 555; s. c. 119 Mass. 429; *McKiernan v. King*, 2 Mont. 72. Contra, *Bromley v. Goodrich*, 15 B. R. 289; s. c. 40 Wis. 131; *Voorhees v. Frisbie*, 8 B. R. 152; s. c. 25 Mich. 476; s. c. 6 L. T. B. 85; *Brigham v. Clafin*, 7 B. R. 412; s. c. 31 Wis. 607; *Fenlon v. Lonergan*, 29 Penn. 471.

If the State courts have jurisdiction, it is not in their discretion whether or not to exercise it. It is their duty to do so when called upon in the mode prescribed by law. *Cook v. Whipple*, 9 B. R. 155; s. c. 55 N. Y. 150.

If Congress had intended by this section of the act to make the jurisdiction of the district courts exclusive in the collection of assets, and to deprive all other courts of jurisdiction over any action by or against assignees in bankruptcy, it would have been as easy as it would have been natural to employ language to express this purpose. But it will be observed that the word exclusive, as descriptive of the jurisdiction, is not only not used, but seems to have been carefully avoided. *Payson v. Dietz*, 8 B. R. 193; s. c. 2 Dillon, 504.

A bankrupt is not a necessary party to a suit brought to enjoin a judgment fraudulently recovered by him. *Weakly v. Miller*, 1 Tenn. Ch. 523.

The assignee can properly institute a suit in a State court only under the direction of the district court. *Chemung Canal Bank v. Judson*, 8 N. Y. 254.

The jurisdiction of the circuit and district courts over controversies with a debtor of the bankrupt or a person who disputes the right to real or personal property with him is concurrent with and does not divest that of the State courts. *Eyster v. Gaff*, 13 B. R. 546; s. c. 91 U. S. 521; s. c. 2 Col. 28. Vide in re *Geo. W. Anderson*, 9 B. R. 360.

A person whose property has been seized under a warrant, may sue the marshal in a State court. *Marsh v. Armstrong*, 11 B. R. 125; s. c. 20 Minn. 81; in re *Isaac Marks*, 2 B. R. 575; s. c. 1 C. L. N. 245; s. c. 16 Pitts. J. J. 12.

Whenever State courts have jurisdiction over controversies between the assignee and third parties, the circuit courts have it independent of the



bankruptcy law if the proper citizenship of the parties exist. *Burbank v. Bigelow*, 14 B. R. 445; s. c. 92 U. S. 179.

An assignee who is a citizen of one State may maintain an action in the circuit court of another State against a party who is a citizen of that State, to enforce a right which may be enforced at common law or in equity. The jurisdiction is conferred by the judiciary act, and is not taken away by mere affirmative legislation conferring like jurisdiction upon another court. The mere grant of jurisdiction to a particular court has never been held to oust any other court of the powers which it before possessed. *Payson v. Dietz*, 8 B. R. 193; s. c. 2 Dillon, 504; *Spaulding v. McGovern*, 10 B. R. 188; *Burbank v. Bigelow*, 14 B. R. 445; s. c. 92 U. S. 179; *Post v. Rouse*, 1 W. N. 39.

If an assignee appears in a State court in an action brought to enforce a lien against the bankrupt's estate, execution may be stayed in order to give the parties an opportunity to apply to the district court. *Rowe v. Page*, 13 B. R. 366; s. c. 54 N. H. 190.

**ACT OF 1898, CH. 2, § 2. Courts' Jurisdiction in Chambers and Term.**— Courts of bankruptcy are invested within their respective territorial limits as now established or as may be hereafter changed with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings in vacation in chambers and during their respective terms, as they are now or may be hereafter held.

ACT OF 1867, § 4973. The district courts shall be always open for the transaction of business in the exercise of their jurisdiction as courts of bankruptcy; and their powers and jurisdiction as such courts shall be exercised as well in vacation as in term time; and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court.

Statute revised — March 2, 1867, ch. 176, § 1, 14 Stat. 517. Prior Statute — Aug. 19, 1841, ch. 9, § 6, 5 Stat. 445.

A proceeding in bankruptcy, from the time of its commencement until the final settlement of the estate, is but one suit. *Sandusky v. First Nat'l Bank*, 12 B. R. 176; s. c. 23 Wall, 289; *in re York & Hoover*, 4 B. R. 479; s. c. 1 Abb. C. C. 503; s. c. 1 L. T. B. 290; *Alabama R. R. Co. v. Jones*, 5 B. R. 97.

The district court, for all the purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. The statute provides that "the courts shall be always open for the transaction of business," so that from the beginning of a proceeding in bankruptcy to its termination there is but one term. *Sandusky v. Nat'l. Bank*, 12 B. R. 176; s. c. 23 Wall. 289; *Ala. & Chat. R. R. Co. v. Jones*, 7 B. R. 145.

Its proceedings in any pending suit are at all times open for re-examination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation. Application for such re-examination may be made by motion or petition, according to the circumstances of the case. Such a motion or petition will not have the effect of a new suit, but of a proceeding in the old one. *Sandusky v. Nat'l. Bank*, 12 B. R. 176; s. c. 23 Wall. 289.

Every court has power to alter and amend its records so as to conform to the truth, during the term to which the record relates. During the pendency of proceedings in a particular case, the court, upon the representation of the clerk that he had omitted to file-mark a particular paper, or had filed it of a wrong date, and upon being satisfied of the truth of the representation, may order him to file the paper as of the date when lodged in his office. *Ala. & Chat. R. R. Co. v. Jones*, 7 B. R. 145.

The bankruptcy court may be a movable court. It is said the clerk's office and the clerk follow the court, but for the transaction of other than bankruptcy business, the clerk's office is stationary at the place designated by law. But the holding of court necessitates the filing of papers and the issue of process. The one can make little progress without the other. Hence it appears that Congress contemplated the necessity of filing papers otherwise than by delivering them to the clerk at his stationary office, although it provided that such office should be their final place of custody. A petition presented to the judge at chambers, and acted upon by him, will be deemed to be filed on the day of its presentation, although not actually deposited in the clerk's office until a subsequent day. *Frank v. Houston*, 9 Kans. 406.

District courts, in the exercise of their exclusive original jurisdiction, may act in administrative matters, or matters of mere discretion, as well in vacation as in term time, and a judge sitting at chambers in such matters has the same power and jurisdiction as when sitting in court. *Shearman v. Bingham*, 5 B. R. 34; s. c. 7 B. R. 490; s. c. 3 C. L. N. 258; *Goodall v. Tuttle*, 7 B. R. 193; s. c. 3 Biss. 219.

Actions at law or suits in equity can not be heard and determined by the district court at chambers, or in vacation. *Shearman v. Bingham*, 5 B. R. 34; s. c. 7 B. R. 490; s. c. 3 C. L. N. 258.

§ 4974. A district court may sit for the transaction of business in bankruptcy, at any place within the district, of which place and of the time of commencing session the court shall have given notice, as well as at the places designated by law for holding sessions of such court.

Statute revised — March 2, 1867, ch. 176, § 1, 14 Stat. 517.

ACT OF 1898, CH. 2, § 2. **Contempts.**— Courts of bankruptcy may (13) enforce obedience by bankrupts, officers and other persons

to all lawful orders by fine or imprisonment or fine and imprisonment \* \* \* and (16) punish persons for contempts committed before referees.

ACT OF 1867, § 4975. The district courts as courts of bankruptcy shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity.

Statute revised — March 2, 1867, ch. 176, § 1, 14 Stat. 517. Prior Statute — Aug. 19, 1841, ch. 9, § 6, 5 Stat. 445.

The proceedings to punish a party for contempt in violating an injunction issued in a case of involuntary bankruptcy must be separate and distinct from those against the bankrupt. *Creditors v. Cozzens & Hall*, 3 B. R. 281; s. c. 2 W. J. 349; s. c. 16 Pitts. L. J. 236.

Where a firm is enjoined, one party will not be liable to punishment for a violation of the injunction by his copartner. *In re South Side R. R. Co.*, 10 B. R. 274; s. c. 7 Ben. 391.

When the action does not tend to enforce any demand against the bankrupt, nor deprive the assignee of any property or right, there is no contempt. *In re Hirsch*, 2 B. R. 3; s. c. 2 Ben. 493; s. c. 1 L. T. B. 92.

It is not a sufficient justification for the violation of an injunction that the party was acting under a fl. fa. issued upon a judgment rendered in a State court. *In re R. Atkinson*, 7 B. R. 143; s. c. 5 L. T. B. 320; s. c. 4 C. L. N. 359; s. c. 19 Pitts. L. J. 183.

ACT OF 1867, § 4976. In case of a vacancy in the office of district judge in any district, or in case any district judge shall, from sickness, absence, or other disability, be unable to act, the circuit judge of the circuit in which such district is included may make, during such disability or vacancy, all necessary rules and orders preparatory to the final hearing of all causes in bankruptcy, and cause the same to be entered or issued, as the case may require, by the clerk of the district court.

Statute revised — June 30, 1870, ch. 177, § 2, 16 Stat. 174.

ACT OF 1898, CH. 2, § 2. **Courts of Bankruptcy in Districts and Territories.**— This section of the law of 1898 provides, as hereinbefore shown, that the supreme court of the District of Columbia, the district courts of the several Territories and the United States courts in the Indian Territory and the district court of Alaska are made courts of bankruptcy.

ACT OF 1867, § 4977. The same jurisdiction, power, and authority which are hereby conferred upon the district courts in cases in bankruptcy are also conferred upon the supreme court of the District of Columbia, when the bankrupt resides in that district.

Statute revised — March 2, 1867, ch. 176, § 49, 14 Stat. 541. Prior Statute — Aug. 19, 1841, ch. 9, § 16, 5 Stat. 448.

§ 4978. The same jurisdiction, power, and authority which, are hereby conferred upon the district courts in cases in bankruptcy are also conferred upon the<sup>1</sup> district courts of the several Territories,<sup>1</sup> subject to the general superintendence and jurisdiction conferred upon circuit courts by section four thousand nine hundred and eighty-six [two], when the bankrupt resides in either of the Territories. This jurisdiction may be exercised, upon petitions regularly filed in such courts, by either of the justices thereof while holding the district court in the district in which the petitioner or the alleged bankrupt resides.

Statutes revised — March 2, 1867, ch. 176, § 49, 14 Stat. 541; June 30, 1870, ch. 177, § 1, 16 Stat. 173. Prior Statute — Aug. 19, 1841, ch. 9, § 16, 5 Stat. 448.

§ 4978 A (Act of April 14, 1876, § 1, 19 Stat. 33). Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases in bankruptcy commenced in the supreme courts of any of the Territories of the United States prior to the twenty-second day of June, Anno Domini eighteen hundred and seventy-four, and now undetermined therein, the clerks of the said several courts shall immediately transmit to the clerks of the district courts of the several districts of said Territories, all the papers in, and a certified transcript of, all the proceedings had in each of said cases; and the said clerks of the district courts shall immediately file the said papers and transcripts as papers and transcripts in the said district courts.

§ 4978 B (Act of April 14, 1876, § 2, 19 Stat. 33). That the clerks of the said several supreme courts shall transmit the papers and transcripts provided for in section one of this act, in each case, to the clerk of the district court of the district wherein the bankrupt or bankrupts, or some one of them, resided at the time of the filing of the petition in bankruptcy in said case; and as soon as the said

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<sup>1</sup> So amended by act of June 22, 1874, ch. 390, § 16, 18 Stat. 182.

papers and transcript in any case shall have been transmitted and filed, as herein provided, the district court in which the same shall have been so filed shall have jurisdiction of the said case, to hear and determine all questions arising therein, and to finally adjudicate and determine the same in all respects as contemplated in other bankruptcy cases by the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," and approved March second, eighteen hundred and sixty-seven, and amendments thereto.

§ 4979. The several circuit courts shall have, within each district, concurrent jurisdiction with the district court of <sup>1</sup> any district, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not, of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest,<sup>1</sup> or owing any debt to such bankrupt, or by any such person against an assignee, touching any property or rights of the bankrupt, transferable to or vested in such assignee.

Statutes revised — March 2, 1867, ch. 176, § 2, 14 Stat. 518; June 8, 1872, ch. 340; 17 Stat. 334. Prior Statute — Aug. 19, 1841, ch. 9, § 8, 5 Stat. 446.

**Construction.**— No jurisdiction of cases at law or in equity relating to the estate, rights or liabilities of the bankrupt is expressly given to the district court elsewhere than by this clause, though the jurisdiction may be well enough held to be included in the general grant of section 4972. In *re John Alexander*, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81; in *re William Christy*, 3 How. 292.

Independent of the bankruptcy act the district courts possess no equity jurisdiction whatever. Whatever jurisdiction they possess in that behalf is wholly derived from the bankruptcy act now in force. *Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65; in *re William Christy*, 3 How. 292.

The jurisdiction of the district court over suits at law or in equity is conferred by the general grant of power to collect all the assets of the bankrupt. *Goodall v. Tuttle*, 7 B. R. 193; s. c. 3 Bliss. 219; *Shearman v. Bingham*, 5 B. R. 34; s. c. 7 B. R. 490; s. c. 3 C. L. N. 258.

Congress in framing the bankruptcy law intended to provide Federal instrumentalities for its complete execution, and such as are sufficient to carry it into full effect. Jurisdiction over an action brought by an assignee to collect a debt due to the estate is not limited to the district court where the proceedings in bankruptcy are pending, but is conferred upon all the district courts. *Shearman v. Bingham*, 5 B. R. 34; s. c. 7 B. R. 490; s. c. 7 C. L. N. 258; *Goodall v. Tuttle*, 7 B. R. 193; s. c. 3 Bliss. 219; *Lathrop v. Drake*, 13 B. R. 472; s. c. 91 U. S. 516. Contra, in *re H. Richardson*, 2 B. R. 202; s. c. 2 Ben. 517; s. c. 2 L. T. B. 20; *Markson v. Heaney*, 4 B. R. 510;

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<sup>1</sup> So amended by act of June 22, 1874, ch. 390, § 3, 18 Stat. 178.

s. c. 1 Dillon, 497; Jobbins v. Montague, 6 B. R. 509; Lamb v. Damron, 7 B. R. 509; s. c. 5 C. L. N. 290.

Controversies, in order that they may be cognizable under this clause, upon the ground of an adverse interest, either in the circuit or district court, must have respect to some property or rights of the bankrupt, transferable to or vested in the assignee; and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in this clause, and against the other. All three of these conditions must concur to give the jurisdiction. The jurisdiction conferred by this clause is other and different from the special jurisdiction and superintendence described in section 4986. Morgan v. Thornhill, 5 B. R. 1; s. c. 11 Wall, 65; Knight v. Cheney, 5 B. R. 305; s. c. 2 L. T. B. 205; Woods v. Forsyth, 2 W. J. 348; s. c. 16 Pitts. L. J. 234; Bachman v. Packard, 7 B. R. 353; s. c. 2 Saw. 264; in re John Alexander, 3 B. R. 20; s. c. Chase, 295; s. c. 2 L. T. B. 81.

The term interest, as used in this section, signifies an estate, share or part, and a suit to be maintained in the circuit court by or against an assignee must be concerning some property or right of property derived from the bankrupt, and in which it must appear that one party or the other claims an interest adversely to — that is, against — the other. Bachman v. Packard, 7 B. R. 353; s. c. 2 Saw. 264.

A claim of a lien and to possession by way of pledge under the lien is adverse to the assignee. The claim to the right of possession may be just as absolute and just as essential to the interest of the claimant as the right of property in the thing itself, and is in fact a species of property in the thing just as much the subject of litigation as the thing itself. Marshall v. Knox, 8 B. R. 97; s. c. 16 Wall. 551.

Where a party claims a right to part of the proceeds of a judgment, and the assignee denies this claim, this is a controversy over which the circuit court has jurisdiction under the bankruptcy law. Burbank v. Bigelow, 14 B. R. 445; s. c. 92 U. S. 179.

The jurisdiction over controversies between an assignee and adverse claimants may be exercised by any circuit court having jurisdiction of the parties, and is not confined to the circuit court of the district in which the decree of bankruptcy was made. Burbank v. Bigelow, 14 B. R. 445; s. c. 92 U. S. 179; Lathrop v. Drake, 13 B. R. 472; s. c. 91 U. S. 516.

The United States may file a bill in the circuit court to obtain payment out of a trust fund held by a trustee appointed in proceedings in bankruptcy. Lewis v. U. S., 13 B. R. 33; s. c. 14 B. R. 64; s. c. 92 U. S. 618.

The circuit court has no jurisdiction of a bill in equity filed by a creditor before the appointment of an assignee, to restrain a mortgagee from disposing of the goods of the bankrupt covered by the mortgage. Johnson v. Price, 13 B. R. 523. Contra, Irving v. Hughes, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451.

The circuit court may entertain a bill brought to obtain an injunction against parties who are interfering with the bankrupt's estate under a claim adverse to that of the assignee. Foster v. Ames, 2 B. R. 455; s. c. Lowell, 313.

The circuit court has jurisdiction of an action to collect a debt due to the bankrupt. *Mitchell v. Manuf. Co.*, 2 Story, 648; *Pritchard v. Chandler*, 2 Curt. 488; *McLean v. Lafayette Bank*, 3 McLean, 185; *Allen v. Binswanger*, 2 Cent. L. J. 724. Contra, *Bachman v. Packard*, 7 B. R. 353; s. c. 2 Saw. 264.

In all cases where an assignee may pursue the remedies provided by this section, a fair interpretation requires that he shall do so. He can not adopt another remedy, as, for instance, summary proceedings. *Smith v. Mason*, 6 B. R. 1; s. c. 14 Wall. 419; s. c. 5 L. T. B. 7; *Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205; in re *Kerosene Oil Co.*, 3 B. R. 125; s. c. 6 Blatch. 521; in re *Bonesteel*, 3 B. R. 517; s. c. 7 Blatch. 175; in re *Ballou*, 3 B. R. 717; s. c. 4 Ben. 135; in re *Masterson*, 4 B. R. 553. Contra, in re *Norris*, 4 B. R. 35; s. c. 1 Abb. C. C. 514; s. c. 1 L. T. B. 227.

A State can not bring a suit in the circuit court. *State v. Trustees*, 5 B. R. 466.

**Subpoena.**—The conferring of the jurisdiction on the two courts concurrently by this section, in the same terms, indicates plainly that one of them can not exercise such jurisdiction to an extent or in a manner different from the other. The jurisdiction conferred on both courts is a regular jurisdiction between party and party, of the same character as that conferred on the circuit courts by section 629, and is to be pursued as to forms and modes of process under the same rules which obtain as to suits brought in the circuit court in pursuance of that section. There is nothing in the bankruptcy act indicating an intention on the part of Congress that process in the suits specified in this section shall be served or made effective in any different manner from that required in suits brought in a circuit court under the jurisdiction in "suits of a civil nature at common law or in equity," conferred on such court by section 629. There is nothing in the acts of Congress, or in the rules in bankruptcy, or in the rules in equity prescribed by the supreme court which authorizes a marshal to serve a subpoena to appear and answer in an equity suit at a place outside of the territorial limits of the district for which he is appointed. *Jobbins v. Montague*, 6 B. R. 117; s. c. 5 Ben. 422; *Paine v. Caldwell*, 6 B. R. 558; s. c. 29 Leg. Int. 284; *Lewis v. Gibson*, 32 Leg. Int. 22.

Rule 13 in equity does not permit the service to be made by leaving the subpoena at the last place of abode or at the last usual place of abode, but the subpoena is to be left at the existing present dwelling-house or the existing present usual customary place of abode. Although the party may have fled from the jurisdiction of the court to avoid the consequences of frauds committed by him on the creditors, yet the district court does not acquire jurisdiction over him by means of a subpoena left at a place which is not his actual abode, though it may be his last place of abode. *Hyslop v. Hoppock*, 6 B. R. 552; s. c. 5 Ben. 447.

The whole subject of the service of a subpoena in a suit in equity is regulated by act of Congress and by the rules in equity established by the supreme court. If a party is not an inhabitant of the district, and is not found within the district, the district court can not obtain jurisdiction over his person by any service of process made otherwise than in accord-

ance with rule 13 in equity. No order can be passed for the service of process by publication, or by a substituted service on a receiver of rents. *Hyslop v. Hoppock*, 6 B. R. 557; s. c. 5 Ben. 533.

The recovery of an inequitable judgment in the State court by a citizen of another State does not confer jurisdiction over him upon the Federal courts of the district where the judgment is recovered, with authority to sustain a bill in equity against him by service of a subpoena upon the attorney who acted for him in obtaining the judgment. *Paine v. Caldwell*, 6 B. R. 558; s. c. 29 Leg. Int. 284.

Where a new term of the district court in equity is held on the first Tuesday of each month, a subpoena may be made returnable on the first Tuesday instead of the first Monday of the month. *Hyslop v. Hoppock*, 6 B. R. 552; s. c. 5 Ben. 447.

Where the defendants in a bill for an injunction reside in different districts in the same State they may be served with process (§ 740) in their respective districts. *Babbitt v. Burgess*, 7 B. R. 561; s. c. 2 Dillon, 169.

**Actions at law.**—Parties seeking redress in the district court in matters relating to bankruptcy, have used the following remedies, to-wit:

**Replevin:** brought by an assignee against a sheriff to recover property held under executions issued upon judgments obtained contrary to the bankruptcy act. *Haughey v. Albin*, 2 B. R. 399; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47.

**Trover:** brought by an assignee to recover the value of property transferred by the bankrupt to a creditor contrary to the bankruptcy act. *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *Wadsworth v. Tyler*, 2 B. R. 316; s. c. 2 L. T. B. 28; *Babbitt v. Walbrun & Co.*, 4 B. R. 121; s. c. 6 B. R. 359; s. c. 1 Dillon, 19; *Mitchell v. McKibbin*, 8 B. R. 548; s. c. 29 Leg. Int. 412; *Brooke v. McCracken*, 10 B. R. 461; s. c. 7 C. L. N. 10; s. c. 8 Pac. L. R. 102. *Contra*, *Gayles v. American*, 14 B. R. 141; s. c. 5 Biss. 86.

The assignee may bring trover to recover the value of property of the bankrupt converted by another to his use. *Carr v. Gale*, 3 W. & M. 38; s. c. 2 Ware, 330.

A demand and refusal of the value of the property is not sufficient. *Schuman v. Fleckenstein*, 9 C. L. N. 174.

Before the assignee can recover the value, he must show a demand and refusal to deliver the property. *Schuman v. Fleckenstein*, 15 B. R. 224; s. c. 9 C. L. N. 174.

A complaint in an action to recover the value of property transferred as a preference, must allege a demand and refusal to deliver the same. *Ibid.*

If the bankrupt co-operates in trying to secure the adverse claims of third persons by removing the property from the reach of his creditors, he may be made a party defendant with them in an action for the tort. *Carr v. Gale*, 3 W. & M. 38; s. c. 2 Ware, 330.

An agent who attempts to aid his principal in enforcing a tortious claim against the bankrupt's goods, claims an adverse interest. *Ibid.*

If the bankrupt aids another in converting his goods to the latter's use



he is liable, not in his capacity as a bankrupt, but as a person, and may be sued by the assignee like any other person for a tort in his private and individual capacity. *Ibid.*

If the title to the property was in the bankrupt, and the pretense of title in a third person was fraudulent, then the removal of the property to another place by the bankrupt and such third party, as if it belonged to the latter, is a conversion. *Ibid.*

If the assignee, in an action of trover, chooses to set out the manner in which he acquired title, his declaration must show that the proceedings are such as make the transfer to him legal and valid. An omission to allege an adjudication of bankruptcy renders the declaration defective. *Wright v. Johnson*, 4 B. R. 627; s. c. 8 Blatch. 150.

If a person sell property, to a part of which he is entitled, and makes no distinct appropriation of either part, the assignee may elect for which he will sue. An action of trover is such an election when the conversion occurs before the suit and after the time to which his title relates. *Mitchell v. McKibbin*, 8 B. R. 548; s. c. 29 Leg. Int. 412.

Trover is not the proper form of action to recover money that may be due under a contract made by the bankrupt with a third party. *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *Wadsworth v. Tyler*, 2 B. R. 316; s. c. 2 L. T. B. 28.

If a party in possession of property, claiming an exclusive right in himself to the whole of it, sells it with an existing intent to appropriate the whole avails to his own exclusive use, the sale is a wrongful conversion of the part to which he is not entitled. *Mitchell v. McKibbin*, 8 B. R. 548; s. c. 29 Leg. Int. 412.

The assignee can not recover in an action of trover any more than the value of the corporeal movable effects. He can not recover the profits received from a business, or the value of the good will. *Ibid.*

Where one count of the answer is a general denial, a special affirmative defense set up in the answer can not be relied on as a separate ground of recovery when no such ground is alleged in the petition. *Cragin v. Carmichael*, 11 B. R. 511; s. c. 2 Dillon, 519.

The assignee can only recover upon the allegations contained in his petition. If he assails a transfer as void under the bankruptcy law, he can not recover upon the ground that the transfer is void under the State law. *Ibid.*

**Assumpsit:** brought by an assignee to recover the money received by a preferred creditor upon a judgment given contrary to the bankruptcy act. *Street v. Dawson*, 4 B. R. 207.

The absence of the counsel originally retained is no ground for a new trial where no postponement was asked on that ground. *Van Dyke v. Tinker*, 11 B. R. 308.

The nonjoinder of the copartners where the preference was given to the firm, can not be raised at the trial on the merits. *Ibid.*

A new trial will not be granted to let in testimony which is merely cumulative. *Ibid.*

To a writ of *scire facias* to have execution of a judgment rendered

against the assignee, the defendant may plead that he has no effects. The judgment for costs in the original suit might have been entered against the assignee personally, and not against the effects of the bankrupt in his hands. *Amblard v. Heard*, 9 Mass. 489.

**Suits in Equity.**—The district court has full and adequate jurisdiction over all matters relating to the settlement of the bankrupt estate, either at law or in equity, by way of petition or bill. Whenever a case is presented which shows that the relief sought is absolutely necessary to protect the interests of the general creditors, such relief will be granted. In *re Bowie*, 1 B. R. 628; s. c. 1 L. T. B. 97; s. c. 15 Pitts. L. J. 448; *Jones v. Leach*, 1 B. R. 595; *Pennington v. Sale & Phelan*, 1 B. R. 572; *March v. Heaton*, 2 B. R. 180; s. c. *Lowell*, 278; *Foster v. Ames*, 2 B. R. 455; s. c. *Lowell*, 313; *Wilson v. Brinkman*, 2 B. R. 468; s. c. 1 O. L. N. 193; *Davis, Assignee of Bittel et al.*, 2 B. R. 392.

A bill in equity has been used for the following purposes, to-wit:

To enjoin proceedings upon executions issued upon judgments rendered in a State court. In *re Bowie*, 1 B. R. 628; s. c. 1 L. T. B. 97; s. c. 15 Pitts. L. J. 448; *Pennington v. Lowenstein et al.*, 1 B. R. 570; *Pennington v. Sale & Phelan*, 1 B. R. 572; *Jones v. Leach*, 1 B. R. 595.

To set aside a sale of the bankrupt's property on the ground of fraud. *March v. Heaton*, 2 B. R. 180; s. c. *Lowell*, 278.

To review and set aside a sale, made after the commencement of proceedings in bankruptcy, by virtue of a deed of trust executed to secure a creditor. *Davis, Assignee of Bittel et al.*, 2 B. R. 392; *Lee v. Franklin Av. S. Inst.*, 3 B. R. 218; s. c. 1 O. L. N. 370; *Phelps v. Sellick*, 8 B. R. 390.

To recover property conveyed by the bankrupt in fraud of creditors. *Bradshaw v. Klein*, 1 B. R. 542; s. c. 2 Bliss. 20; s. c. 1 L. T. B. 72; *Pratt v. Curtis*, 6 B. R. 139.

To recover money obtained upon a judgment given contrary to the bankruptcy act. *Wilson v. Brinkman*, 2 B. R. 468; s. c. 1 O. L. N. 193.

To enforce a right of redemption in mortgaged property. *Foster v. Ames*, 2 B. R. 455; s. c. *Lowell*, 313.

To recover money paid secretly by the debtor to a creditor, to induce him to sign a compromise agreement in fraud of the rights of other creditors. *Bean v. Brookmire*, 7 B. R. 568; s. c. 1 Dillon, 151; s. c. 2 Dillon, 108; s. c. 6 L. T. B. 114.

To set aside a mortgage on the property of the bankrupt made by him with intent to prefer a creditor. *Seammon v. Cole*, 3 B. R. 593; s. c. 2 L. T. B. 103; *McLean v. Lafayette Bank*, 3 McLean, 415.

To remove a cloud on the title of the assignee arising from official acts done by an officer, under color of law and in the execution of legal process. *Beers v. Place & Co.*, 4 B. R. 459; s. c. 36 Conn. 579; s. c. 1 L. T. B. 162.

To ascertain what liens exist, and pass upon their validity, although an order has been previously passed by the bankruptcy court for the sale of the property. *Shaffer v. Fritchery*, 4 B. R. 548.

To recover the amount demanded by a corporation as interest upon a loan above what its charter allowed it to receive, when the collaterals

have been sold by it and applied to the debt. *Tiffany v. Boatman's Savings Inst.*, 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 14; s. c. 18 Wall. 376.

To recover the value of property transferred by one partner in fraud of the partnership. *Taylor v. Rasch*, 5 B. R. 399.

To discharge incumbrances and ascertain their amount and priority. *McLean v. Lafayette Bank*, 3 McLean, 415.

For an account brought by an assignee against the bankrupt's principal. *Mitchell v. Manuf. Co.*, 2 Story, 648.

To set aside an assignment and reach dividends paid to a creditor thereunder. *Chemung Canal Bank v. Judson*, 8 N. Y. 254.

To set aside a pretended lien upon the bankrupt's estate. *Stickney v. Wilt*, 11 B. R. 97; s. c. 23 Wall. 150.

To recover money paid by the bankrupt to the defendant as a preference. *Flanders v. Abbey*, 6 Biss. 16; *Harmanson v. Bain*, 15 B. R. 173.

A bill in equity is the most convenient and effectual remedy to remove the lien of an execution or judgment. It enables the court to settle the rights of all the parties in one suit, and not leave the sheriff to a further litigation with the judgment creditor. The sheriff ought not to be proceeded against or called upon to settle the question in conflict on his own responsibility, nor without such a proceeding as will, by concluding the execution creditor, protect him in delivering the property levied upon to the assignee. *Warren v. Tenth Nat'l. Bank*, 7 B. R. 481; s. c. 10 Blatch. 493.

Where an assignee has a claim in part as a beneficiary to the proceeds of property placed in the hands of an agent, and in part as a creditor, but can not ascertain the exact limits of each claim without a discovery, he may file a bill asserting both claims, and make it a general creditor's bill. *Stotesbury v. Cadwallader*, 31 Leg. Int. 229.

If an assignee with knowledge or with reason to believe that one claiming to be a creditor of the bankrupt has proved a debt against the estate which has no existence, or which is tainted with fraud, neglects or refuses to contest the allowance of such debt, other creditors who have proved their debts may seek the aid of a court of equity to annul the allowance. *Bank v. Cooper*, 9 B. R. 529; s. c. 20 Wall. 171.

A creditor can not maintain a bill in equity to have the claim of another creditor disallowed, without averring more than that the district court drew a wrong conclusion from the evidence. *Ibid.*

After two trials on all the evidence that can be produced, the assignee is not bound to enter an appeal to the circuit court, nor to allow an appeal in his name. *Ibid.*

A bill in equity can not be maintained to set aside a transfer on the ground of preference, when the remedy at law is plain, adequate, and complete. *Garrison v. Markley*, 7 B. R. 246.

Even if the complainant could get a larger and more satisfactory measure of relief, that would not justify the circuit court in an interference with the jurisdiction and proceedings of another court of concurrent power. No case can be found where a court of chancery has undertaken to

wrest property from another court of chancery of concurrent jurisdiction, because it thought its own power better fitted to give complete and ample relief. *Blake v. Ala. & Chat. R. R. Co.*, 6 B. R. 331.

The fact that the complainant raises questions in the circuit court which are not raised in a suit in another court, does not authorize the circuit court to take from the latter the property which it has under its control. The circuit court may pass upon questions not raised in the other court, even between the same parties, and relating to the same; but no case can be found authorizing the circuit court to interfere with property in the possession of another court of concurrent jurisdiction. *Ala. & Chat. R. R. Co. v. Jones*, 7 B. R. 145.

The fact that the receiver appointed by another court is not doing his duty, or has in any degree abandoned the property, does not authorize the circuit court to interfere. The receiver is responsible to the court which appointed him, and to that court alone. Appeals should be made to the court which appointed him, and any redress for his misconduct must be sought there. *Ibid.*

The jurisdiction of another court can not be questioned in the circuit court, so as to deprive the former of the custody of property. That question should be first made to the court exercising jurisdiction. *Ibid.*

Where a bill in equity has been filed prior to the commencement of proceedings in bankruptcy, by a prior mortgagee, to which subsequent mortgagees are made parties, the assignee, upon his appointment, should not file an original bill to sell the property free from all incumbrances, where the subsequent mortgages cover some property not included in the prior mortgage; but he should file a cross-bill in the suit in equity. *Sutherland v. Lake Superior Canal Co.*, 9 B. R. 298; s. c. 1 Cent. L. J. 127.

After the proceeds of property sold upon an execution are in the hands of the sheriff, the assignee who is pursuing the assets of the bankrupt in the hands of a third party, is not bound to resort to the State court. He has a right to proceed against the party directly in the Federal courts for the proceeds, and is not obliged to resort to the State court, where the matter is substantially ended, for relief. *Traders' Nat'l. Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87; *Zahn v. Fry*, 9 B. R. 546; s. c. 21 Pitts. L. J. 155; s. c. 31 Leg. Int. 197.

Independent of the question whether the assignee may not always, if he sees fit, seek the aid of a court of chancery to set aside a fraudulent conveyance or illegal transfer, the right to call for an account is not questionable. *Verselius v. Verselius*, 9 Blatch. 189.

The assignee has the right, as ancillary to relief by an account, to have a discovery from the defendant to supply the deficiency in his own knowledge, and his ignorance of the particulars sought not only entitles him to a discovery, but excuses the want of more precise specification of the particular fraud alleged. *Ibid.*

There is no ground for proceeding in the circuit court by a bill in equity against the bankrupt himself, to obtain affirmative relief by injunction or otherwise. The summary jurisdiction of the district court embraces ample power to compel obedience by him to all orders and decrees neces-

sary to enforce the surrender and appropriation of his property. *Beecher v. Binninger*, 7 Blatch. 170.

The claim to relief on the grounds of the right to a discovery can not be maintained when the complainant knows that the property transferred consists in a stock of merchandise, for this constitutes data amply sufficient to enable a competent pleader to frame a declaration at law, with all the particularity necessary in such a case. It would, no doubt, be convenient to know the exact items and quantities and numbers of each kind, but this is not necessary, because the pleader may cover the whole range of items of each kind, and may state the numbers, quantities, and values broadly enough to cover any possible proofs that may be made. *Garrison v. Markley*, 7 B. R. 246.

The assignee, by an examination of the grantee, may obtain all the information which he could possibly obtain by an answer to a bill in equity. *Ibid.*

Since the law has been changed, so as to allow parties to be called and examined as witnesses in trials at law, bills for discovery in aid of trials at law, or to enforce purely legal rights, have become entirely unnecessary — have, in fact, fallen into disuse, and may be considered practically obsolete. *Ibid.*

A bill for discovery should allege that the facts can not be proven by any other witness, and this allegation can not be truthfully made in the case of a transfer by the bankrupt, for the bankrupt is a competent witness. *Ibid.*

A mortgagee may file a bill to foreclose a mortgage in the circuit court. *Buckingham v. McLean*, 3 McLean, 185; s. c. 13 How. 151.

The assignee may file a bill to vacate a transfer of property, although he is in possession thereof. *Kellogg v. Russell*, 11 B. R. 121; s. c. 11 Blatch. 519.

**Parties.**— Prior to the adjudication, the petitioning creditor may file a bill in equity in the district court to enjoin a preferred creditor from disposing of the property. *In re J. J. Fendley*, 10 B. R. 250; s. c. 1 Cent. L. J. 433.

If the assignee is dead, and no one has been appointed in his stead, a creditor has a right to file a bill to detain property of the bankrupt, to be administered by an assignee subsequently appointed. *Clark v. Clark*, 17 How. 315.

It is immaterial whether the creditor who files the bill has proved his debt or not, for he may subsequently prove it. *Ibid.*

The assignee has the right to file a bill in the circuit court against all the incumbrancers claiming liens on a piece of property, to test the validity, priority, and amount of their claims. *McLean v. Lafayette Bank*, 3 McLean, 415.

Where the bill alleges preferences, several creditors claiming by distinct conveyances may be joined if they have a common interest in one or more leading facts in the bill, though in some other things there is no common interest. *Ibid.*

**Parties** who have received the property of the bankrupt under fraud-

ulent conveyances may be joined, although the conveyances were separate and distinct acts. *Spaulding v. McGovern*, 10 B. R. 188.

If the object of the suit is to affect property held by a trustee in trust for a minor or feme covert, the trustee is a necessary party. *O'Hara v. MacConnell*, 93 U. S. 150.

If a junior mortgagee merely seeks to obtain a sale of the equity of redemption, a prior mortgagee is not a necessary party. *Jerome v. McCarter*, 15 B. R. 546.

If two executions have been levied upon the property of the bankrupt, under such circumstances as make them void as a preference, and the proceeds placed in the possession of one of the execution creditors, the court will require the other creditor to be made a party to the suit, if he is within its jurisdiction, and his interest and absence are formally brought to the attention of the court; but if this can not be done, it will proceed to administer such relief as may be in its power between the parties before it. The organization of the Federal courts has always required them to dispense with parties in chancery not within their jurisdiction, unless their presence is an absolute necessity. *Traders' Nat'l Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87.

In a proceeding to set a transfer aside for fraud or illegality, the bankrupt has a direct interest in the question whether the property shall be taken from the grantee, and is, therefore, a proper party. *Verselius v. Verselius*, 9 Blatch. 189.

The holder of a part of the mortgage notes is a necessary party to a suit in equity to foreclose the mortgage. *In re Edward A. Casey*, 8 B. R. 71; s. c. 10 Blatch. 376.

The district court has jurisdiction over a party who is served with process in the district, although he does not reside therein. *Babbitt v. Burgess*, 7 B. R. 561; s. c. 2 Dillon, 169.

If a party, who is out of the district, voluntarily appears and answers, he thereby makes himself a party to the suit. *McLean v. Lafayette Bank*, 3 McLean, 415.

The appearance of a party who was personally served with process can not be withdrawn. *Fenton v. Colverd*, 11 B. R. 535.

Whether the bankrupt is a proper party to a bill in equity, filed by the mortgagee against the assignee and the bankrupt, will not be considered where the bankrupt has appeared and answered. *Lockett v. Hill*, 9 B. R. 167; s. c. 1 Woods, 552.

**Pleadings.** The bill need not point out the particular section of the bankruptcy law which gives the complainant a right to assail a transfer. The bill is to set out facts, and it would be bad pleading to allege the law. *Pratt v. Curtiss*, 6 B. R. 139.

Affirmative relief will not be granted in equity on the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue by the pleadings. *Voorhees v. Bonesteel*, 7 Blatch. 495; s. c. 16 Wall. 16.

A bill to set aside a preference must allege that the preferred creditor knew that the preference was made in fraud of the provisions of the bankruptcy law. *Crump v. Chapman*, 15 B. R. 571.

When the bill seeks to set aside a preference, all the persons connected with the transaction should be made parties. *Harmanson v. Bain*, 15 B. R. 173.

A bill to set aside a preference should pray in terms for a recovery of the property, or should allege the value and pray in terms for the recovery of the value. *Ibid.*

An assignee in his bill need not allege the details of the facts by which he becomes entitled to maintain the suit. *Lakin v. First Nat'l Bank*, 15 B. R. 476; s. c. 13 Blatch. 83.

When fraud is a necessary part of a complainant's case, the facts constituting the fraud should be set forth so that the opposite party may be advised of the case he has to meet. *Smith v. Auerbach*, 2 Mont. 348.

An allegation that a transfer is void under the bankruptcy law is not sufficiently specific. The pleading should set forth the clause under which it is void, and state the necessary facts. *Ibid.*

A charge of fraud or illegality in the alternative is sufficient. *Versellus v. Versellus*, 9 Blatch. 189.

If the bankrupt, being the owner of a vessel, transferred a part thereof, an action to set aside the transfer can not be united with an action for the appointment of a receiver, on the ground that there is an irreconcilable difference between the assignee and transferee, because they proceed on entirely different grounds, and are repugnant to each other. *Wilkinson v. Dobbie*, 12 Blatch. 298.

A bill in equity may be verified by the oath of the agent or attorney in fact of the petitioning creditor. *In re J. J. Fendley*, 10 B. R. 250; s. c. 1 Cent. L. J. 433.

If the bill alleges the consideration for a transfer, the respondent should, if the allegation is not true, deny it positively, and set up the real consideration. *Burpee v. Nat'l Bank*, 9 B. R. 314; s. c. 5 Biss. 405.

A general denial of fraud in an answer is equivalent to nothing more than a denial of a conclusion of law. *Lathrop v. Drake*, 13 B. R. 472; s. c. 91 U. S. 516.

If a respondent, on information and belief, denies an allegation of matters which may be, or can be, assumed to be within his personal knowledge, the allegation will be taken to be true. *Burpee v. Nat'l Bank*, 9 B. R. 314; s. c. 5 Biss. 405.

The rule that a respondent can not deny on information and belief those matters which may be, or can be, assumed to be within his personal knowledge, applies also to a corporation. *Ibid.*

Any informality in the answer may be overlooked on final hearing, if the answer denies the material allegations of the bill in such a manner as to constitute an issue within the established rules of equity pleading. *Ibid.*

A denial on information and belief, of matters that are within the personal knowledge of the respondent, does not meet the charge in the bill. If he does not know anything on the subject he should say so directly. *Ibid.*

If the respondent may not know, or can not be assumed to know, the

matters charged in the bill, he may answer on information and belief. *Ibid.*

The rule in chancery pleading is not that every allegation of a bill be taken as true, simply because it is not denied in the answer. If any allegation is to be taken as true, simply because it is not denied, it is only an allegation of some fact which is presumed to be within the knowledge of the party answering. *White v. Jones*, 6 B. R. 175.

When the answer denies certain allegations of the bill and the plaintiff does not contest the denial by a replication, the truth of the denial is to be taken as admitted, and the denied allegations as entirely unsustained. *Vogle v. Lathrop et al.*, 4 B. R. 439; s. c. 4 Brewst. 253.

No defendant is bound to answer any interrogatories, except such as by the note at the foot of the bill he is required to answer. *French v. First Nat'l. Bank*, 11 B. R. 189; s. c. 7 Ben. 488.

A corporation must answer a bill under its common seal, and not on oath; but the answer must be stated therein to be according to the knowledge, information and belief of its officers, ascertained from all proper sources of information. *Ibid.*

The officers and agents of a corporation can not be compelled to answer the interrogatories in a bill unless they are parties to the cause. *Ibid.*

If a party in his answer lays no claim to the property in controversy, he in effect makes none in the cause, and can not complain of a decree for not awarding to him what he did not claim. *Buckingham v. McLean*, 13 How. 151; s. c. 3 McLean, 185.

An answer by a creditor in respect to a debtor's state of mind, though responsive to the bill, is entitled to but little weight, unless the reasons for the belief are given. *Ibid.*

An answer which is responsive to the bill, must prevail, unless it is overcome by the testimony of two witnesses to the substantial facts, or at least by one witness and other attending circumstances. *Lonergan v. Fenlon*, 7 Pitts. L. J. 266.

The answer of one defendant is not evidence against his codefendant. *Phoenix v. Ingraham*, 5 Johns. 412.

A demurrer for the misjoinder of parties defendants can only be taken by those who are improperly joined. *Spaulding v. McGovern*, 10 B. R. 188.

A plea to the jurisdiction averring that the cause of action occurred out of the district, and that the defendant resided out of the district, is bad where the cause of action is not local, unless it avers that the defendant was not found and served in the district. *Babbitt v. Burgess*, 7 B. R. 561; s. c. 2 Dillon, 169.

An objection that the complainant has a complete remedy at law can not be taken at the hearing. It can only be taken by demurrer, or by way of answer. *Post v. Corbin*, 5 B. R. 11.

If an assignee files a bill for a satisfaction of a mortgage given to two parties, and a reconveyance from one of them, who took an absolute deed of a portion of the property as security for a debt, when both debts are paid, the party who took the absolute deed can not demur on the ground of multifariousness. *Hill v. Bonaffon*, 2 W. N. 356.



**Practice.**— If the answer sets up a title to certain property which the assignee seeks to reach by his bill, and no evidence is introduced by either party, his claim can not be allowed. *Buckingham v. McLean*, 13 How. 151; s. c. 3 McLean, 185.

Where there is a coassignee who is not made a party complainant, and the complainant absconds, the bill will not be dismissed until proper proceedings are taken on notice to the coassignee to bring him in and compel him to elect whether he will or not be made a party complainant. *Fenton v. Collerd*, 11 B. R. 535.

If the loan on which a corporation reserved a greater rate of interest than was allowed by its charter, has been repaid, the assignee of the borrower in a court of equity can only recover the excess. *Tiffany v. Boatman's Sav. Inst.*, 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 14; s. c. 18 Wall. 376.

A contract whereby a corporation reserves a greater interest than is permitted by its charter, is void, and can not be enforced in a court of justice. *Tiffany v. Boatman's Sav. Inst.*, 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 14; s. c. 18 Wall. 376.

If the execution creditor consents, the sheriff may be allowed to sell the property and deposit the proceeds, less the amount of his fees, in the district court, to abide the result of the litigation to determine the validity of his lien. *In re William H. Shuey*, 9 B. R. 526; s. c. 6 C. L. N. 248.

When the creditors have requested the assignee to contest the validity of a levy under an execution, an injunction granted upon the petition of a creditor will be continued until the assignee can file a bill in equity. *Ibid*.

If the court decides that the assignee has no title to the property, it will dismiss the bill, and not retain it to decide controversies between other parties to the cause. *Smith v. Little*, 9 B. R. 111; s. c. 5 Bls. 269.

If the assignee, acting under an order of the district court in a case where it had no jurisdiction, takes possession of goods and sells them, the claimant, under a bill in equity, is entitled to recover the full value of the goods, clear of all expenses, whether the assignee realized that full value or not. *Marshall v. Knox*, 8 B. R. 97; s. c. 16 Wall. 551.

A receiver may be appointed where the apparent titles to property are such on their face that the marshal can not act efficiently under the usual warrant. He will be limited to collecting rents and the interest on securities. *Keenan v. Shannon*, 9 B. R. 441; s. c. 31 Leg. Int. 85.

No notice of a motion for the appointment of a receiver is necessary where the parties to be affected by the appointment are in court represented by counsel who appear to resist the motion. *McLean v. Lafayette Bank*, 3 McLean, 503.

A receiver may be appointed when such appointment is proper and necessary. *Sedgwick v. Place*, 3 B. R. 139; s. c. 3 Ben. 360; *McLean v. Lafayette Bank*, 3 McLean, 503.

A receiver may be appointed to take charge of property in the hands of a receiver appointed by a State court, in a proceeding against an insolvent corporation. *Platt v. Archer*, 6 B. R. 465; s. c. 9 Blatch, 559.

If the party alleged to hold the property adversely to the complainant is not served with process, a receiver will not be appointed. *Hyslop v. Hoppock*, 6 B. R. 552; s. c. 5 Ben. 447.

A receiver will not be appointed where, upon the hearing of the motion, it is not apparent that the ultimate determination of the suit in favor of the complainants is probable. *Wilkinson v. Dobbie*, 12 Blatch. 298.

The opinion of a portion of the creditors in regard to the management of the estate may be disregarded, unless they offer to indemnify the other creditors. There may be a class of creditors willing to assume risks which they have no right to ask others to incur. The former class can not dictate to the latter. *Keenan v. Shannon*, 9 B. R. 441; s. c. 31 Leg. Int. 85.

An order may be passed requiring the defendant to account before a master for the moneys, notes, and other property received by him. *Beu-jamin v. Graham*, 4 B. R. 391.

Courts, in collateral actions, will not listen to any argument which proceeds upon the allegation that the adjudication of bankruptcy was erroneous in fact or in law; but will, on the contrary, presume that the decree is correct. *Beecher v. Binninger*, 7 Blatch. 170; *Clark v. Binnlinger*, 39 How. Pr. 363.

Where the assignee proceeds, by bill in equity, against parties claiming an adverse interest, his suit is subject to the ordinary rules governing courts of equity, and regulating its discretion in other cases. Therefore, on an application for an injunction and a receivership in the first instance, where the plaintiff insists that it be granted before the merits of the controversy shall be examined and considered, on the proofs of both parties, on all the questions of law and fact, he must not only show a cause of adverse and conflicting claims, and that the case is one of equitable cognizance, but he must show some emergency, some peril of loss, which the court will be unable completely to redress; and the danger must be clear, and the right, in general, free from reasonable doubt. *Beecher v. Binninger*, 7 Blatch. 170.

In cases of voluntary assignments, it is by no means of course to make, on motion, an order for a preliminary injunction before the filing of the answer. Cases have occurred in which the voluntary assignment protected equities which, without it, could not be protected under the bankruptcy law itself. In one case, a judgment binding the debtor's land had, by due course of law, been obtained against him between the execution of the voluntary assignment and the commencement of the proceedings in bankruptcy. In another case, the bankrupt's father had, with his own concurrence, been expressly excluded from the benefit of the voluntary assignment, which had created a trust for all the other creditors. In each case, the voluntary assignment was an act of bankruptcy; but the assignee, asking the aid of equity, was not in either case at liberty to disregard the palpable existing equities, which could not be made available without the aid of the prior assignment. In such cases, if the trustee is not an unworthy person, his trust may be usefully administered in his own name until the final decree. Of course, it can not be administered without the permission of the circuit court, or independently of supervision by

the assignee. Where disposal by him is allowed, but distribution prohibited, he ordinarily receives his reasonable charges, including an equitable proportion, usually one-half, of the commission which would otherwise be chargeable. *Barnes v. Rettew*, 8 Phila. 133.

Where the bill on its face shows that the defendant is a minor and a feme covert, a guardian ad litem must be appointed before a decree pro confesso can be entered against her for failure to appear and answer. *O'Hara v. MacConnell*, 93 U. S. 150.

A decree pro confesso for failure to appear and answer can not be made until the term next succeeding the day of default. *Ibid.*

**Evidence.**—Proof of false and fraudulent statements in regard to the condition of the company at the time of subscribing for stock is not admissible in a suit by the assignee against the subscriber to recover the amount unpaid under such subscription. *Upton v. Hansbrough*, 10 B. R. 369; s. c. 3 Biss. 417.

The burden of proof rests upon the complainant. *Scammon v. Cole*, 5 B. R. 257.

The rules in equity of the supreme court have not taken away the power which the district court has as a court of equity to have the testimony of witnesses taken in open court. That power is expressly reserved in the 78th rule, which implies its existence and its perpetuation. It is there left to the discretion of the court. *Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372.

The exclusion of husband and wife as witnesses for each other in civil suits is not based solely on interest, but rests on principles of public policy, and as the statute only removes the ground of interest, the ground of public policy still renders them incompetent. *In re David W. Jones*, 9 B. R. 56; s. c. 6 Biss. 68.

The bankrupt's schedule is not admissible in favor of a fraudulent grantee to establish the validity of his title. *Carr v. Gale*, 2 Ware, 330; s. c. 3 W. & M. 38.

An admission made by the bankrupt before the commencement of the proceedings in bankruptcy is competent evidence against his assignee. *Marks v. Barker*, 1 Wash. 178.

The declarations of a party to a sale or transfer, going to destroy and take away the vested rights of another, are not competent evidence against the vendee or assignee, when made after such sale or transfer. *Phoenix v. Ingraham*, 5 Johns. 412.

The subsequent acts of a party to a sale or transfer are not competent evidence. *Ibid.*

A judgment creditor has not such title in property taken under an execution as will enable him to maintain an action for conversion against the assignee to whom it has been delivered by the marshal after taking it from the sheriff. *Ansonia B. & C. Co. v. Pratt*, 17 N. Y. Supr. 443.

**ACT OF 1898, CH. 4, § 25. Appeals and Writs of Error.**—(a) That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of ap-

peals of the United States, and to the supreme court of the Territories, in the following cases, to-wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

(b) From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States.

(c) Trustees shall not be required to give bond when they take appeals or sue out writs of error.

(d) Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

Where specifications filed in opposition to discharge have been overlooked, and a discharge granted, such error or irregularity is one which is subject to review by the circuit court. Law of 1867. *In re Buchstein*, 17 B. R. 1.

Appeal in suit in equity allowed only upon final decree, where the sum in controversy exceeds \$500. *In re Zug & Co.*, 16 B. R. 280.

Granting of a rehearing, or granting or dissolving a temporary injunction, is always within the sound discretion of the court, and, therefore, furnishes no ground of appeal. *Bullington v. Harvey, Assignee*, 17 B. R. 474.

Appeal from the order or decision of district court against a creditor's claim. A prior adjudication by the court had been made in a proceeding to distribute a particular fund that securities were preferential. Held, that such prior adjudication was conclusive upon the creditors; that.

although the decision of the court rejecting proof of the claim against the estate was vacated by the appeal, the grounds of their decision were not vacated, but were available against the creditor. In *re Leland*, 16 B. R. 505.

ACT OF 1867, § 4980. Appeals may be taken from the district to the circuit courts, in all cases in equity, and writs of error from the circuit courts to the district courts may be allowed in cases at law arising under or authorized by this Title, when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the district court to the circuit court for the same district.

Statute revised — March 2, 1867, ch. 176, § 8, 14 Stat. 520.

**Construction.**— Under this section, when the matter decided is of an equitable character, and is, therefore, one which is usually reviewed in the Federal courts by appeal, it may be carried to the circuit court by that mode of transferring cases. When it is a question which, by the system of Federal jurisprudence, is treated as a question of law, it may be carried to the circuit court by a writ of error; but, in either case, the debt or damages claimed must amount to more than \$500. *Ruddick v. Billings*, 3 B. R. 61; s. c. 1 Wool. 330.

**Quaere**, How are the words "debts or damages claimed," to be construed? *Ibid*.

Judgments in actions at law rendered in the district court, if founded upon the verdict of a jury, can never be reversed in a summary way, as the Constitution provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rule of the common law." Two modes only were known to the common law to re-examine such facts, to-wit, the granting of a new trial by the court where the issue was tried or to which the record was returnable; or, secondly, by the award of a *venire facias de novo* by an appellate court for some error of law, which intervened in the proceeding. Congress could not provide that a judgment of the district court, founded upon the verdict of a jury in a civil action, whether for a less or greater sum than \$500, should be revised in the circuit court in a summary way, and inasmuch as suits in equity are placed in the same category as actions at law, no provision for an appeal is made where the debt or damage claimed does not exceed \$500, and the decrees of the district court in such case are final and conclusive. *Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205; *Ins. Co. v. Comstock*, 8 B. R. 145; s. c. 16 Wall. 258.

Appellate jurisdiction of decisions of the district court is conferred upon the circuit court in four classes of cases; 1st. By appeal in cases in equity

decided in the district court under the jurisdiction created by the act; 2d. By writs of error in cases at law decided in the exercise of that jurisdiction; 3d. By appeal from decisions rejecting wholly or in part the claims of supposed creditors; and 4th. By appeal from decisions allowing such claims. In the first two classes of cases, the appeal or writ of error is given to the unsuccessful party to the suit, whether in equity or at law; in the third class it is given to the dissatisfied creditor; in the fourth to the dissatisfied assignee. The suits belonging to the first two classes of cases are those of which concurrent jurisdiction is given to the circuit and district courts by section 4979, and hence the appellate jurisdiction in such cases, by appeal or writ of error, is limited to suits at law or in equity by assignees against persons claiming an adverse interest, or owing a debt to the bankrupt, or by such persons against assignees. In *re John Alexander*, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81; in *re O'Brien*, 1 B. R. 176; *Street v. Dawson*, 4 B. R. 207; in *re York & Hoover*, 4 B. R. 479; s. c. 1 Abb. C. C. 503; s. c. 1 L. T. B. 290; *Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65; *Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205.

The judgments or decrees of the district court rendered in the exercise of the regular jurisdiction between party and party can not be reviewed or revised in any other manner than that provided in the twenty-second section of the judiciary act and subsequent acts. *Colt v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274.

The removal of such cases into the circuit court must be effected under the regulations prescribed in the twenty-second section of the judiciary act and subsequent acts. *Ibid.*

Mere questions are not re-examinable under those regulations, nor will any judgment or decree be regarded as a regular final judgment or decree for such a purpose, unless it is rendered in term time when the court is in session. *Ibid.*

**Appeals.**—The phrase "case in equity," means a suit in equity. Courts of law frequently pass upon questions purely equitable on motion or rule, but the nature of the question has never been held to make such motion or rule a case in equity. It is a very common practice for courts of law, on motion, to set aside sales made by a sheriff on execution, on account of some fraud or unfairness on the part of the sheriff or purchaser, yet he would be a bold man who would insist that such a motion was a case in equity. When money is brought into court—the proceeds of a sale on execution—courts of law do not hesitate, on motion, to direct how the money shall be distributed, assuming to pass upon the priorities of claimants to the fund; yet, it has never been supposed that, by so doing, they were rendering a decree in chancery, or that the motion to distribute the fund according to the rights of the parties made a case in equity. When the district court passes upon the validity of a sale, and directs the distribution of the fund arising therefrom, on motion or rule to show cause, the motion is not a case in equity, nor the ruling of the court a decree in equity. It is the simple exercise of a power incident to courts of law as well as equity, to regulate the proceedings in a case pending before it, to control its own process and to distribute funds brought into court. In *re York & Hoover*, 4 B. R. 479; s. c. 1 Abb. C. C. 503; s. c. 1 L. T. B. 290.

Summary proceedings in the district court can not be revised by an appeal to the circuit court. *Samson v. Blake*, 6 B. R. 401; *Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372.

An appeal can not be taken to revise a decision on a question relating to the bankrupt's discharge. In *re J. M. Reed*, 2 B. R. 9; *Ruddick v. Billings*, 3 B. R. 61; s. c. 1 Wool. 330; *Colt v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274.

An appeal will not lie from a decision in a case of involuntary bankruptcy declaring the debtor a bankrupt. In *re O'Brien*, 1 B. R. 176.

An appeal to the circuit court does not lie by the petitioning creditor from an order of the district court vacating an order adjudicating the debtor a bankrupt at the instance of another creditor. The remedy of the petitioning creditor in such a case is under section 4986. In *re Hall*, 1 Dillon, 586.

The appeal in cases in equity must be from the final decree, and from that only. The language of the section plainly indicates that it is to be from a decree, and not from any and every order in the progress of the cause. *Clark v. Iselin*, 9 Blatch. 196; *Platt v. Stewart*, 47 How. Pr. 206.

This section provides for an appeal in two classes of cases, namely, in "cases in equity" and on a "decision" allowing or rejecting a claim. It is, therefore, appropriate to use the expression "decree or decision appealed from." The language refers to and is apt to describe each class, and only indicates that in cases in equity a decree may be the subject of appeal, and that where a claim is allowed or rejected, the appeal is to be taken within ten days after the "decision" referring to the immediately preceding language, giving an appeal "from the decision" of the district court allowing or rejecting such claim. *Clark v. Iselin*, 9 Blatch. 196.

An order which directs the ascertainment of the amount due under a mortgage, without fixing the terms and conditions of the foreclosure of the equity of redemption, or the time at which the foreclosure shall be final and operative, is interlocutory merely, and not a final decree. In *re Edward A. Casey*, 8 B. R. 71; s. c. 10 Blatch. 376.

A decree which merely declares a conveyance void, but directs a reference to the master to take an account of the rents and profits, and to make allowances affecting the rights of the parties, is not a final decree. *Platt v. Stewart*, 47 How. Pr. 206.

The decree must be final as to all parties, and as to all rights claimed in the litigation sought to be reviewed. If the decree is not final as to one party, the appeal of others will not be entertained. *Ibid*.

Where the omission to take the appeal in time arose from a mistake in the selection of the remedy, the district court may grant a review of the decree so that a regular appeal may be taken. *Stickney v. Wilt*, 11 B. R. 97; s. c. 23 Wall. 150.

When an appeal is taken to revise summary proceedings, the decree may be affirmed if the circuit court finds it to be correct upon the facts of the case. *Samson v. Blake*, 6 B. R. 401.

When the question raised on an appeal is doubtful, no costs will be allowed. *Clark v. Iselin*, 9 Blatch. 196; *in re Place & Sparkman*, 9 Blatch. 369.

**Writ of error.**—It is the right of the excepting party in a case of involuntary bankruptcy, which is tried before a jury, to have the questions arising during the trial, if duly presented by a bill of exceptions, re-examined by the circuit court on a writ of error. *Ins. Co. v. Comstock*, 8 B. R. 145; s. c. 16 Wall. 258; *Phelps v. Classen*, 3 B. R. 87; s. c. 1 Wool. 204; *Lehman v. Strassberger*, 2 Woods, 554.

A writ of error lies in a case of involuntary bankruptcy, although the case was tried before a jury during a vacation. *Lehman v. Strassberger*, 2 Woods, 554.

No writ of error lies from the circuit court to the district court, where the case is tried before the court without the intervention of a jury. *Blair v. Allen*, 3 Dillon, 101.

A bill of exceptions which on its face does not appear to have been taken at the trial is insufficient. *Strain v. Gourdin*, 11 B. R. 156; s. c. 2 Woods, 380.

A bill of exceptions to the rejection of certain evidence is insufficient if it does not set out the evidence so rejected. *Ibid.*

A petition for a writ of error which is not made a part of the bill of exceptions forms no part of the record, although it purports to set out all the evidence in the case. *Ibid.*

If the errors in the instruction did not materially affect the merits of the action, and the court could have properly told the jury to find the verdict as they did, the judgment will be affirmed. *Schulenberg v. Kabureck*, 2 Dillon, 132; *Walbrun v. Babbitt*, 6 B. R. 539; s. c. 9 B. R. 1; s. c. 16 Wall. 577.

A denial of a motion for a nonsuit is not reviewable in error. *Miller v. Jones*, 15 B. R. 150.

Questions of fact can not be re-examined on a writ of error. It may be necessary, to enable the court to see the principle of law that was decided, to make the facts, to some extent, a part of the record by bill of exceptions, but it is always the law decided that is subject to review, and not the facts. *Ruddick v. Billings*, 3 B. R. 61; s. c. 1 Wool. 330; *Cragin v. Thompson*, 12 B. R. 81; s. c. 2 Dillon. 513.

It is no ground for reversing a judgment that it is rendered payable in gold coin, without finding any such state of facts as would justify that kind of judgment. It would be the regular mode in the absence of a stipulation by the parties to find the value in currency, but this would only involve the necessity of ascertaining the difference in value between coin and currency, and adding it to the coin value. The result would practically be the same, for the amount of currency would be increased so as to equal the value as actually found in coin. The party would be required to pay exactly the same value, although the number of dollars in currency would be greater. He is, therefore, in no way injured by the judgment for coin. *Edmondson v. Hyde*, 7 B. R. 1; s. c. 2 Saw. 205; s. c. 5 L. T. B. 380.



If a case is tried without a jury, the circuit court can not, on a writ of error, go behind the general finding for the party to inquire into the weight or sufficiency of the evidence. *Babbitt v. Burgess*, 7 B. R. 561; s. c. 2 Dillon, 169.

Parties litigant should, if they so desire, interpose their technical objections in the district court, and if they do not, they ought not to be heard for the first time in the appellate court upon such points, especially where it is obvious that the judgment was such as the law and facts demanded. Technical and formal defects should be assailed in order that they may be corrected in the court of original jurisdiction. Such defects are no ground for the reversal of a judgment in the appellate court. *Ibid.*

Objection to the pleadings can not be entertained in the circuit court (§ 954), unless they were raised by a special demurrer in the district court. *Ibid.*

A motion to dismiss a writ of error will be overruled if it be made before the day on which the writ is returnable. *Globe Ins. Co. v. Cleveland Ins. Co.*, 21 I. R. R. 14.

Instructions are entitled to a reasonable construction, and if correct when applied to the facts submitted to the jury, they will be sustained in an appellate court, even though if standing alone or without any explanation they would be incomplete in respect to some matter sufficiently explained in the evidence. *Willis v. Carpenter et al.*, 14 B. R. 521.

**Proof of claims.**—A decision that the claim of one creditor is not entitled to priority, and the claim of another is, is not a rejection of the first claim. A creditor's claim is the debt due from the bankrupt to him, and the question of priority of payment is one totally distinct from the question of the allowance or rejection of the claim or debt. There is a distinction between the claim of a debt or demand against the bankrupt, and the claim of priority as to other creditors. A claim of priority is not a claim asserted against the bankrupt, but a right asserted against other creditors. *In re York & Hoover*, 4 B. R. 479; s. c. 1 Abb. C. C. 503; s. c. 1 L. T. B. 290.

When an investigation has been had and a decision as to the validity of a claim has been made by the district court, the right of an objecting creditor to contest the claim ceases, and any further proceedings to review the decision must be taken by the assignee. *In re Troy Woolen Co.*, 9 B. R. 329; s. c. 9 Blatch. 191.

If the appellant does not file his appeal in the office of the clerk of the circuit court, at the term which is held next after the expiration of ten days from the time of claiming the same, and does not set forth a statement, in writing, of his claim, to which the assignee can plead or answer, and thereby form an issue to be tried, the appeal will be dismissed, although he claimed an appeal within the proper time, and gave due notice thereof to the clerk of the district court and the opposite party. *In re Coleman*, 2 B. R. 671; s. c. 7 Blatch. 192; *in re Place et al.*, 4 B. R. 541; s. c. 8 Blatch. 302.

A decree rejecting a claim, and directing that the assignee recover costs

against the claimant, to be taxed by the clerk, and have execution therefor, is final in such a sense that an appeal will lie therefrom. It settles the rights of the parties, finally rejects the claim, and awards a recovery of costs and execution therefor. No act of the court is necessary to the full and final effect of its order. The ten days begin to run from the entry of the decree, and not from the taxation of the costs. *In re Place & Sparkman*, 9 Blatch. 369.

An objection which goes to the jurisdiction of the court does not rest in discretion. *Ibid.*

If no bond is given within the required ten days, no appeal can be allowed. Still, if the bond is in proper form, and properly executed, and is in a proper amount, and the sureties are sufficient, the judge of the district court may approve it as a bond which would be a proper one if given in time, leaving it to the appellee to move the appellate court to dismiss the appeal if such a course shall seem proper to him. The bond must clearly and accurately state by what court the decree appealed from was rendered. *Benjamin v. Hart*, 4 B. R. 408.

ACT OF 1898, CH. 4, § 25. **Appeals, how taken.**— Appeals may be taken when allowable as in equity cases, within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

From any final decision of a court of appeals an appeal, when allowable, may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States.

ACT OF 1867, § 4981. No appeal shall be allowed in any case from the district to the circuit court unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from; nor unless the appellant at the time of claiming the same shall give bond in the manner required in cases of appeals in suits in equity; nor shall any writ of error be allowed unless the party claiming it shall comply with the provisions of law regulating the granting of such writs.

Statute revised — March 2, 1867, ch. 176, § 8, 14 Stat. 520.

The failure to give notice to the adverse party within ten days, whether claimant or assignee, is equally fatal to the appeal as the failure to give the notice to the clerk that the appeal is claimed. *Wood v. Bailey*, 12 B. R. 132; s. c. 21 Wall. 640.

The words "defeated party" must be construed as "opposite party," or "successful party," or "adverse party." *Wood v. Bailey*, 12 B. R. 132; s. c. 21 Wall. 640.

ACT OF 1867, § 4982. Such appeal shall be entered at the term of the circuit court which shall be held within the district next after the expiration of ten days from the time of claiming the same.

Statute revised — March 2, 1867, ch. 176, § 8, 14 Stat. 520.

The right of appeal, as given by the statute, can neither be enlarged nor restricted by the district or circuit court. The regulation of appeals is a regulation of jurisdiction. The circuit court has no jurisdiction of any appeal in any case under the bankruptcy act from the district court, unless it is claimed, and bond is filed at the time it is claimed, and notice of it given, as required by this section, within ten days after the entry of the decree or decision appealed from; and unless it is entered at the term of the circuit court first held within and for the proper district next after the expiration of ten days from the time it was claimed. In *re* John Alexander, 3 B. R. 29; *s. c.* Chase, 295; *s. c.* 2 L. T. B. 81; in *re* Kyler, 3 B. R. 46; *s. c.* 6 Blatch. 514; *Hawkins v. Hastings Nat'l Bank*, 1 Dillon, 453; *Sedgwick v. Fridenberg* 11 Blatch. 77.

Although the circuit court will not and can not get any jurisdiction of the appeal if the same is not taken in ten days, yet by the filing and serving of the notice of the appeal the court does obtain jurisdiction, and the words which refer to the entering of the appeal at the next circuit are merely directory, and the time for filing the transmiss may be enlarged by agreement. *Baldwin v. Rapplee*, 5 B. R. 19; *Barron v. Morris*, 14 B. R. 371; *s. c.* 2 Woods, 354.

The district judge or a circuit judge may, in a proper case, enlarge the time for entering an appeal, and an application for that purpose should be made as soon as the parties are apprehensive that they will not have time sufficient to prepare proper pleadings. *Barron v. Morris*, 14 B. R. 371; *s. c.* 2 Woods, 354.

Although the rule in regard to entering the appeal is merely directory, still, if it is disregarded, the appellee has a *prima facie* ground of dismissal. *Ibid.*

What is required to be filed in the circuit court within ten days from the time of taking the appeal, is the appeal containing a statement of the appellant's claim, and a brief account of what has been done in the district court, and the grounds of appeal. It is not necessary that the transcript of the proceedings in the district court shall be filed within ten days. *Ibid.*

When an appeal has not been properly taken, a motion for a reargument, so that an appeal may be taken from the decree when re-entered, will not be granted, unless the case is one of unquestionable mistake, evincing perfect good faith, and is meritorious; and even then, to grant such relief is going to the extreme verge of judicial decisions. A court should not do indirectly what it has no power to do directly, except, perhaps in such extraordinary and extreme cases as ought to be considered as exceptions to an almost inflexible and absolute general rule. In *re* Troy Woolen Co., 6 B. R. 16; *s. c.* 5 Ben. 413.

Taken literally, the ten days' limitation does not extend to writs of error, but the better opinion is in view of the fact that writs of error and appeals are associated together in the preceding sections, that the word appeal in this section means the same as review or revision, and that it was intended to include the writ of error as well as appeal, as the whole section seems to contemplate a more expeditious disposition of the cause in the appellate court than that prescribed in the judiciary act or the act to amend the judiciary system. *Ins. Co. v. Comstock*, 8 B. R. 145; s. c. 16 Wall. 258; *Coit v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274.

ACT OF 1867, § 4983. If the appellant in writing waives his appeal before any decision thereon, proceedings may be had in the district court as if no appeal had been taken.

Statute revised — March 2, 1867, ch. 176, § 8, 14 Stat. 520.

ACT OF 1867, § 4984. A supposed creditor who takes an appeal to the circuit court from the decision of the district court, rejecting his claim in whole or in part, shall, upon entering his appeal in the circuit court, file in the clerk's office thereof, a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall thereupon be had in the pleadings, trial and determination of the cause, as in actions at law commenced and prosecuted, in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to the creditor.

Statute revised — March 2, 1867, ch. 176, § 24, 14 Stat. 528. Prior Statute — April 4, 1800, ch. 19, § 58, 2 Stat. 35.

A creditor can not demand payment of his debt until he makes and presents to the assignee the proper proof. This provision is analogous in purpose and proceeding to the probate of the debts against the estate of a decedent before being presented to or allowed by an administrator. When this is done, parties interested may object to the claim, and the court — the district judge without a jury in a summary manner — may reject the claim as not being duly proved, or as being founded in fraud, illegality, or mistake. Then, and not before, the supposed creditor may bring an action in the circuit court against the assignee, and have his right to payment regularly tried. But this action can only be maintained by the creditor's first taking an appeal from the order rejecting his claim. This appeal must be taken within a limited time, in a particular manner, and to a particular court. The right to sue the assignee is postponed and limited to the happening and performance of these precedent circum-

stances and conditions. But they are not adjudications, but only proceedings preliminary of adjudication. *Catlin v. Foster*, 3 B. R. 540; s. c. 1 Saw. 37; s. c. 1 L. T. B. 192.

The statement must be in form and substance a declaration of the supposed cause of action, to which the adverse party can plead and go to trial. *In re Place et al.*, 4 B. R. 541; s. c. 8 Blatch. 302.

The provisions of this section seem to be made for ordinary debts, and if taken literally, the case of an equitable debt is overlooked. But the circuit court has full appellate power, and may make such order in relation to appeals, not fully provided for in this section, as may be necessary to conform the proceedings to the nature of the case. *In re Blandin*, 5 B. R. 39; s. c. Lowell, 543; s. c. 2 L. T. B. 198.

The circuit court has no original jurisdiction to receive and allow debts against the estate of a bankrupt. The claims of creditors must first be presented in the district court. It is not proper to present one claim in the district court and under cover of an appeal transform the claim into a new and distinct cause of action. In other words, the circuit court on appeal ought not to be called upon to decide questions either of law or of fact that were not raised and involved in the decision of the district court. The same cause of action is to be pursued, though it may happen that new or further proofs in support of that cause of action may establish facts not proved below, and new questions of law may arise thereupon. *In re Jaycox & Green*, 7 B. R. 578; s. c. 13 B. R. 122; s. c. 12 Blatch. 209; s. c. 13 Blatch. 70.

Where the proof in the district court is on a note, the creditor can not in the circuit court rely on a claim for money loaned. *In re Jaycox & Green*, 7 B. R. 578; s. c. 13 B. R. 122; s. c. 12 Blatch. 209; s. c. 13 Blatch. 70.

ACT OF 1867, § 4985. The final judgment of the circuit court, rendered upon any appeal provided for in the preceding section, shall be conclusive, and the lists of debts shall, if necessary, be altered to conform thereto. The party prevailing in the suit shall be entitled to costs against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they shall be allowed out of the estate.

Statute revised — March 2, 1867, ch. 176, § 24, 14 Stat. 528.

ACT OF 1898, CH. 4, § 24. **Jurisdiction of Appellate Courts.**—  
(a) The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate

jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

(b) The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

ACT OF 1867, § 4986. The circuit court for each district shall have a general superintendence and jurisdiction of all cases and questions arising in the district court for such district when sitting as a court of bankruptcy, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not; and except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case as in a court of equity; and the powers and jurisdiction hereby granted may be exercised either by the court in term time, or, in vacation, by the circuit justice or by the circuit judge of the circuit.

Statutes revised — March 2, 1867, ch. 176, § 2, 14 Stat. 518; June 8, 1872, ch. 340, 17 Stat. 334. Prior Statute — August 19, 1841, ch. 9, § 6, 5 Stat. 445.

An appellate tribunal will take cognizance only of matters appearing upon record of court below. A discharge pending the appeal can not be pleaded in the appellate court. *Serra & Hijo v. Hoffman*, 17 B. R. 124.

An appeal lay under act of 1867 to United States Supreme Court from a decree of circuit court while exercising its supervisory jurisdiction under the bankruptcy law, where the proceedings in the district court were to be treated as a suit in equity. *Milner v. Meek*, 17 B. R. 82.

Under act of 1867, a proceeding by an assignee upon a petition praying for an adjustment of liens upon a bankrupt's real estate, for an order to sell, and for "such other relief as may be proper," is in substance a suit in equity, and will be treated as such, where all the parties have appeared, presented their claims by answer or cross-petition, waived all errors of form, proceeded to a final hearing, and appealed it to the circuit court. *Ibid*.

Where an appeal is taken by one of the lien-creditors, the other lien-creditors are not necessary parties to such appeal. *Ibid*.

Construction. — It would be difficult to use language capable of conferring a more complete supervision over all the proceedings of the district court in bankruptcy. There is not only a general superintendence; but, lest that word might not include everything, there is a general jurisdiction

conferred. This extends not only to all cases, but to all questions arising under the act. In other words, the circuit court may review the whole case and decide on it, or it may assume jurisdiction of any particular question arising in the progress of the case. This jurisdiction can only be exercised over proceedings in bankruptcy already pending in the district court. *Ruddick v. Billings*, 3 B. R. 61; s. c. 1 Wool. 330; *in re John Alexander*, 3 B. R. 29; s. c. *Chase*, 295; s. c. 2 L. T. B. 81; *Bill v. Beckwith*, 2 B. R. 241; *Littlefield v. Del. & Hudson Canal Co.*, 4 B. R. 257.

The revision contemplated by this clause is evidently of a special and summary character, substantially the same as that given in the prior bankruptcy act, as sufficiently appears from the words "general superintendence" preceding and qualifying the word jurisdiction, and more clearly, from the fact that the jurisdiction extends to mere questions, as contradistinguished from judgments or decrees, as well as to cases, showing that it includes the latter as well as the former and that the jurisdiction may be exercised in chambers as well as in court, and in vacation as well as in term time. *Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65; *Cott v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274.

The only construction, which gives due effect to all parts of the act relating to revisory jurisdiction, is that which, on the one hand, excludes from the category of general superintendence and jurisdiction of the circuit court, the appellate jurisdiction defined by section 4980; and, on the other, brings within that category all decisions of the district court, or the district judge at chambers which can not be reviewed upon appeal or writ of error under the provisions of that section. *In re John Alexander*, 3 B. R. 29; s. c. *Chase*, 295; s. c. 2 L. T. B. 81.

Power to revise all cases and questions which arise in the district courts in a proceeding in bankruptcy, "except when special provision is otherwise made," is conferred upon the circuit courts; but this power does not extend to any case where special provision for the revision of the case is otherwise made, as where it is provided that an appeal will lie from the district court to the circuit court, or where a writ of error will lie from the circuit court to the district court, in the manner provided in the laws of Congress allowing appeals and writs of error. *Smith v. Mason*, 6 B. R. 1; s. c. 14 Wall. 419; s. c. 5 L. T. B. 7; *Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205; *Stickney v. Wilt*, 11 B. R. 97; s. c. 23 Wall. 150.

The proceeding in bankruptcy, from the filing of the petition to the discharge of the bankrupt and the final dividend, is a single statutory case or proceeding. In the conduct of the case a large number of questions may arise. Before the assets of the bankrupt can be collected and distributed, it will frequently occur that the assignee or a creditor will be driven to a regular bill in equity or an action at law. In these cases, the circuit court has no supervisory jurisdiction, nor has it where the claim of a supposed creditor has been rejected in whole or in part, or where the assignee is dissatisfied with the allowance of a claim. These classes of cases may be taken up on writ of error or appeal. But all other cases and questions arising in the progress of a case of bankruptcy through the bankrupt court, whether the matter is of legal or equitable cognizance, and

when the matter is not the subject of a regular suit in equity or at law, or the allowance or disallowance of a claim, fall within the supervisory jurisdiction, and may upon bill, petition or other proper process of any party aggrieved, be heard and determined in the circuit court as a court of equity. In *re York & Hoover*, 4 B. R. 479; s. c. 1 Abb. O. C. 503; s. c. 1 L. T. B. 290.

Jurisdiction is conferred upon "the circuit court within the district where the proceedings shall be pending," but the meaning of Congress, in employing that language, is to describe the particular circuit court in which the jurisdiction shall be exercised, and not the state of the matter to be revised, as it was clearly the intention of Congress that all such matters should be subject to revision in the circuit court, whether interlocutory or final. Revision must be sought in the circuit court of the district where the proceedings took place which the petitioner asks to have revised; but he is not deprived of a remedy because the decree is in its nature final. It was the intention of Congress to subject every ruling, order and decree of the district court, in bankruptcy cases, to the examination and revision of the circuit court. *Littlefield v. Del. & Hudson Canal Co.*, 4 B. R. 257.

It is not every proceeding in a bankrupt case that the circuit court is authorized to review. The circuit court is not empowered to pass upon the doings and actings of the registers, or assignees, or creditors. The case or question presented for revision must be a case or question fairly presented to and passed upon by the bankruptcy court. That is the court of first resort. To that court first must the question and proofs be presented, and if that court errs upon the question presented, then, and then only, can resort be had to the circuit court. A party can not go into the circuit court in the first instance to make his case or question. *Ala. & Chat. R. R. Co. v. Jones*, 7 B. R. 145.

The circuit court will not set aside an alleged fraudulent sale of real estate ordered by the bankruptcy court and made by the assignee, unless the motion is first presented to the bankruptcy court, because it can only review the action of the court, and not the action of the assignee. *Bailey v. Whitfield*, 7 B. R. 173.

There is no warrant for limiting the jurisdiction of the circuit court to review summary proceedings in bankruptcy by any measure of the value of the property involved. *Samson v. Blake*, 6 B. R. 410; s. c. 9 Blatch. 379.

If there is nothing in the record to show that the district court found anything upon a particular point, the circuit court can not consider that as a question properly before it for revision. In *re McGilton et al.*, 7 B. R. 294; s. c. 3 Biss. 144.

The bankruptcy act does not contemplate the bringing of cases relating to the election of an assignee, and the qualifications of voters before the circuit court for review. To decide upon the legality of the votes or qualifications of creditors involves no principle of equity unless fraud in the election is alleged. The district courts are vested with large discretionary powers in reference to the appointment and approval of as-



signees, and the circuit courts will decline to interfere with them. *Woods v. Buckwell*, 7 B. R. 405; s. c. 2 Dillon, 38; in re *Adler Brothers*, 2 Woods, 571.

The action of the district court in removing an assignee or consenting to a removal by a vote of the creditors is not subject to review under this section. In re *Adler Brothers*, 2 Woods, 571.

The circuit court has jurisdiction to revise the proceedings of the district court for the middle district of Alabama. *Alabama R. R. Co. v. Jones*, 5 B. R. 97.

Decrees of the district court are final, in the constitutional sense, although they are rendered under an act of Congress which makes them subject to revision by the circuit court, and consequently the right of such revision is not inconsistent with the interest which the opposite party acquires in the decree. Rendered as the decree is, subject to revision in the circuit court, no party acquires or can acquire any interest in the decree to defeat the right of such revision. *Littlefield v. Del. & Hudson Canal Co.*, 4 B. R. 257.

The superintendence and jurisdiction conferred by this clause are advisory of cases and questions arising in the district court, and contemplate a review of what is presented to that court for consideration and decision. They may include the power which, in a special and perhaps more restricted form, was given in the sixth section of the bankruptcy act of 1841, wherein authority was given to adjourn any point or question arising in any case in bankruptcy, into the circuit court, to be there heard and determined; and it may be that, under the present act, the presentation of such questions, and the jurisdiction of the circuit court over them, does not, as in the former, depend upon the discretion of the district court. But, in either view, the question, or cases presenting such questions, must arise in the district court; and their determination in the circuit court is either for the guidance or control of the district court. This is not a jurisdiction to assume the conduct of the proceedings, or to specifically enforce or execute the orders or decrees of that court. For that purpose the district court has ample and exclusive power. The act does not blend or confound the two courts in the administration of the bankruptcy law. The courts are distinct under that act, as under all others, and exercise a separate jurisdiction, each in its own sphere. The proceedings for a review of the decree of the district court bring the decree, and whatever orders are involved therein, before the circuit court; but do not operate to transfer the entire proceedings in bankruptcy into the circuit court, to be there continued as in a court of first instance. If the decree is affirmed, it stands as the decree of the district court, and not of the circuit court; and is to be carried into due execution by the former, and not the latter. In re *Binnliger et al.*, 3 B. R. 487; s. c. 7 Blatch. 159; s. c. 1 L. T. B. 183; in re *Binnliger et al.*, 3 B. R. 489; s. c. 7 Blatch. 165; s. c. 1 L. T. B. 186.

The exercise of this jurisdiction is not placed by the act under specific regulations and restrictions like the proceeding by appeal or writ of error, nor has the supreme court prescribed any rule concerning it. It must

depend on the sound discretion of the court. Unreasonable delay in invoking the superintending jurisdiction should not be allowed, nor should such excessive rigor be exercised that the ends of justice will probably be defeated. *In re John Alexander*, 3 B. R. 29; s. c. *Chase*, 295; s. c. 2 L. T. B. 81; *Littlefield v. Del. & Hudson Canal Co.*, 4 B. R. 257; *Sutherland v. Kellogg*, 2 Biss. 405; *In re Work*, *McCough & Co.*, 30 Leg. Int. 361; *Bank v. Cooper*, 9 B. R. 529; s. c. 20 Wall. 171.

What is a reasonable time depends on the circumstances of each case. Generally it should be fixed in analogy to the period designated within which appeals must be taken. *Bank v. Cooper*, 9 B. R. 529; s. c. 20 Wall. 171.

A review may be applied for at any time before the supposed erroneous order is carried into execution. *In re Edward A. Casey*, 8 B. R. 71; s. c. 10 Blatch. 376.

If a party delays unreasonably to file the petition for a review, he may be required to pay the costs which have been incurred in executing the decree. *Thames v. Miller*, 2 Woods, 564.

Power to make rules for the orderly conducting of business in court is vested in the circuit court as well as in the supreme court, provided such rules are not repugnant to the laws of the United States, and are not inconsistent with the rules relating to the same subject established by the supreme court. *Sweatt v. Boston R. R. Co.*, 5 B. R. 234; s. c. 1 L. T. B. 273.

The jurisdiction conferred by this clause can only be exercised within and for the district "where the proceedings in bankruptcy shall be pending." *Shearman v. Bingham*, 5 B. R. 34; s. c. 7 B. R. 490; s. c. 3 C. L. N. 258.

If the judge was a creditor at the time when the proceedings were commenced, and has since assigned his claim, he is not legally disqualified to act in the case, and, being qualified, he is not at liberty, upon a matter of mere personal feeling or preference, to decline the responsibility thrown upon him by official position. *In re Sime & Co.*, 7 B. R. 407; s. c. 5 Pac. L. R. 217.

This section does not declare in terms that the party aggrieved, or any party, shall have the right to invoke that superintendence and jurisdiction; but that is necessarily implied. A court of justice is not at liberty to disown its jurisdiction, or to refuse to entertain parties who apply in due form for its exercise. Where the jurisdiction is itself discretionary, it may be declined; and where parties do not apply in the legal or prescribed manner, or in due season, or are otherwise in fault in the matter of the review sought, doubtless the court may dismiss their application. And the control of the court over frivolous and vexatious appeals of any kind is not questionable. But the court can not impose compulsory dismissal as a penalty or consequence of alleged or supposed misconduct elsewhere, which has no effect to delay or impede the exercise of the power of the court in the matter of the relief sought. It will not compel a party to elect whether he will further prosecute his petition of review or an action commenced in a State court against the appellee to restrain

him from prosecuting the proceedings in bankruptcy. In *re Binninger et al.*, 3 B. R. 489; s. c. 7 Blatch. 168; s. c. 1 L. T. B. 187.

There is one class of cases where, by the provisions of the bankruptcy act, issues may be framed and tried by a jury, to-wit, where the debtor opposes the petition that he may be adjudged a bankrupt. Such cases, when tried by a jury, if the circuit court has any jurisdiction upon the subject, must be removed into the circuit court by a writ of error, as they, when tried by a jury, are excluded from the special jurisdiction conferred under this clause by the very words of the clause. Where "special provision is otherwise made," the case is excluded from the general superintendence and jurisdiction of the circuit court by the exception introduced as a parenthesis into the body of this part of the section. Special provision is made in such cases within the meaning of that exception when the case is tried by a jury, and there is not a word in the act having the slightest tendency to show that Congress intended that a fact found by a jury in a district court should be re-examined in a summary way by the circuit court. Such cases may be tried by the district court without a jury, and in that event no doubt is entertained that the case is within the supervisory jurisdiction of the circuit court. *Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65.

Special provision is not otherwise made for the re-examination by the circuit court of the decision of the district court in granting or refusing a discharge, and hence it can only be done under the power conferred by this clause. *Colt v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274.

If a claim is allowed in spite of the opposition of a contesting creditor, he may take the question to the circuit court by a revisory petition. In *re Adolph Joseph*, 2 Woods, 390. *Contra*, in *re Troy Woolen Co.*, 9 B. R. 329; s. c. 9 Blatch. 191.

If an assignee appeals from the allowance of a claim and an opposing creditor files a petition of review, the circuit court may determine which form of proceeding shall be retained. In *re Adolph Joseph*, 2 Woods, 390.

If a fund recovered in an action instituted before the commencement of the proceedings in bankruptcy is deposited in the registry of the district court, an order upon a petition of the bankrupt, praying that a certain part thereof be awarded to him and his attorney, is reviewable by a supervisory petition. *Maybin v. Raymond*, 15 B. R. 353; 4 A. L. T. (N. S.) 21.

Even if the circuit court can review an interlocutory order made by the district court in a suit in equity before a final decree has been made in the cause, the review can only be had by means of an appeal, and not by means of a petition of review. *Warren v. Tenth Nat'l Bank*, 9 Blatch. 193.

Questions of law which arise in the progress of a proceeding in involuntary bankruptcy, where a jury trial has been demanded, can only be reviewed by a writ of error after a final adjudication. In *re Oregon B. P. & P. Co.*, 14 B. R. 394; s. c. 3 Saw. 529.

The granting or refusing of a motion for a new trial is a matter resting in the sound discretion of the district court, under all the circumstances of the case, and can not be revised by the circuit court, and the statute intended to provide for the revision of questions of law and not questions of discretion. In *re Daniel Marsh*, 6 Law Rep. 67.

The circuit court will not decide whether a new trial ought to be granted or not, unless all the evidence which was given at the trial and all the circumstances of the whole case are brought before it by a complete report. *Ibid.*

It has been decided that the following proceedings may be reviewed in this way, to-wit:

Proceedings in involuntary bankruptcy to have a debtor declared a bankrupt, where there is no trial by a jury. *Perry v. Langley*, 2 B. R. 596; s. c. 8 A. L. Reg. 427; *Farrin v. Crawford*, 2 B. R. 602; in *re Craft*, 1 B. R. 378; s. c. 2 B. R. 111; s. c. 6 Blatch. 177; s. c. 2 Ben. 214; *Sutherland v. Kellogg*, 2 Biss. 405; *Thornhill v. Bank*, 5 B. R. 367; s. c. 1 Woods, 1; in *re Picton*, 11 B. R. 420; s. c. 2 Dillon, 548.

Proceedings on the bankrupt's application for a discharge. In *re J. M. Reed*, 2 B. R. 9; *Ruddick v. Billings*, 3 B. R. 61; s. c. 1 Wool. 330; *Littlefield v. Del. & Hudson Canal Co.*, 4 B. R. 257; *Coit v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274.

A decision refusing to stay proceedings on a suit in a State court against the bankrupt. In *re W. E. Robinson*, 2 B. R. 342; s. c. 6 Blatch. 253; s. c. 36 How. Pr. 176; s. c. 2 L. T. B. 18.

Proceedings instituted by an assignee to sell property belonging to the bankrupt's estate. In *re John Alexander*, 3 B. R. 29; s. c. Chase, 295; s. c. 2 L. T. B. 81; *Markson v. Heaney*, 1 Dillon, 511, note.

Proceedings on a summary petition filed in the cause in bankruptcy to recover property held contrary to the bankruptcy act. *Bill v. Beckwith*, 2 B. R. 241; in *re Kerosene Oil Co.*, 3 B. R. 125; s. c. 6 Blatch. 521.

Proceedings upon a petition for release from arrest. In *re J. H. Kimball*, 2 B. R. 354; s. c. 6 Blatch. 232; s. c. 2 Ben. 551.

Proceedings for the purpose of ascertaining and liquidating liens. In *re York & Hoover*, 4 B. R. 479; s. c. 1 Abb. C. C. 503; s. c. 1 L. T. B. 290.

But a decision allowing or disallowing a claim can not be reviewed. In *re Place et al.*, 4 B. R. 541; s. c. 8 Blatch. 302.

When the proceedings in the district court are founded on a bill in equity, they can only be reviewed and revised by an appeal under section 4980, and not by a petition under this section. In *re Bonesteel*, 3 B. R. 517; s. c. 7 Blatch. 175.

The circuit court will not issue a writ of prohibition to a State court, prohibiting it from entertaining suits instituted by persons who are parties to the proceedings in bankruptcy when such suits do not interfere with the exercise of its own jurisdiction. In *re Binniger et al.*, 3 B. R. 487; s. c. 7 Blatch. 159; s. c. 1 L. T. B. 183.

The circuit court will not, during the pendency of proceedings to review the decree of the district court, direct the marshal to take possession of the property of the bankrupt, nor proceed to ascertain and liquidate the assets. The circuit court can not assume the primary exercise of the summary jurisdiction conferred upon the district court. *Clark et al.*, 3 B. R. 489; s. c. 7 Blatch. 165; s. c. 1 L. T. B. 186.

**Proceedings for Review.**—The only way in which the circuit court can

exercise its supervisory jurisdiction in such cases is by a petition addressed to the circuit court, stating clearly and specifically the point or question decided in the district court, charging that the petitioner is aggrieved thereby, and praying the circuit court to review and reverse the decision of the court below. The adverse party should be duly notified of the pendency and prayer of the petition, and of the day assigned for hearing the same. The circuit court will hear and act upon such petition in chambers or elsewhere. In re J. M. Reed, 2 B. R. 9; Ruddick v. Billings, 3 B. R. 61; s. c. 1 Wool. 330; in re Edward A. Casey, 8 B. R. 71; s. c. 10 Blatch. 376.

The revisory jurisdiction of the circuit court may be exercised by bill as well as by petition. If a regular bill in equity seeks to review the proceedings and decision of the district court, it is a proper proceeding, and ought to be entertained by the circuit court. Marshall v. Knox, 8 B. R. 97; s. c. 16 Wall. 551.

A bill of review may be treated as a petition for review. Hurst v. Teft, 13 B. R. 108; s. c. 12 Blatch. 217.

A notice of appeal is not a proper process for invoking a review of a summary proceeding. In re Edward A. Casey, 8 B. R. 71; s. c. 10 Blatch. 376.

A creditor may file a bill to revise an adjudication of bankruptcy rendered upon the petition of another creditor. Sweatt v. Boston R. R. Co., 5 B. R. 234; s. c. 1 L. T. B. 273. Contra, Ala. & Chat. R. R. Co. v. Jones, 7 B. R. 145.

Commissioners appointed by a State court in a proceeding to forfeit the charter of a corporation do not represent the corporation, and have no right or authority to interfere in a proceeding against the corporation. Thornhill v. Bank, 5 B. R. 367; s. c. 1 Woods, L.

An allegation by the petitioner that he is aggrieved is not sufficient, unless it is also alleged in what the error consists, whether of law or of fact, and the nature of the error should be distinctly stated for the information of the appellate court, and as a matter of notice to the opposite party. Appellate courts, even in appeals, proceed upon the ground that the decree in the subordinate court was correct, and the burden to show error is upon the appellant. Matters of fact, as well as matters of law, may, doubtless, be revised in the circuit court, but it was not the intention of Congress in this form of proceeding to give a party a second trial merely as such, but to secure to him an appellate tribunal for the re-examination and revision of the rulings, orders, and decrees of the district courts, and for the reversal of the same in case they are found to be erroneous. Littlefield v. Del. & Hudson Canal Co., 4 B. R. 257; Sutherland v. Kellogg, 2 Biss. 405; Samson v. Blake, 6 B. R. 410; s. c. 9 Blatch. 379; in re Edward A. Casey, 8 B. R. 71; s. c. 10 Blatch. 376.

In ordinary cases, it may be sufficient if a statement is made by counsel, under the direction of the judge of the district court, setting forth the order or ruling complained of, and sufficient facts to enable the appellate court to form an opinion upon the point. This, verified by the judge or clerk, would form the basis of the petition or bill in the circuit court. The

whole case may also be brought up by bill of exceptions, or otherwise. *Sutherland v. Kellogg*, 2 Biss. 405.

Appeals in equity suits and in causes of admiralty and maritime jurisdiction, vacate the respective decrees in the subordinate courts, and remove the whole record into the court of paramount jurisdiction, but nothing of the kind is done in a proceeding by petition under this section. *Littlefield v. Del. & Hudson Canal Co.*, 4 B. R. 257.

The filing of a petition for the exercise of the revisory power of the circuit court does not ordinarily operate as a stay of the proceedings in the subordinate court. *Adams v. Railroad Co.*, 4 B. R. 314; s. c. 1 Holmes, 5; s. c. 6 A. L. Rev. 365.

If the district court decides that a creditor is entitled to a lien, the assignee may file a petition for review. *Bartlett v. Russell*, 34 Pitts. L. J. 206; s. c. 9 C. L. N. 377.

The petition may be amended. *Littlefield v. Del. & Hudson Canal Co.*, 4 B. R. 257; *Sutherland v. Kellogg*, 2 Biss. 405.

The statement of an attorney that he is duly authorized by the petitioner to institute and prosecute the proceeding, is conclusive evidence of the fact, unless some proof to the contrary is shown. *Ala. & Chat. R. R. Co. v. Jones*, 5 B. R. 97.

A service of the petition upon the person who acted as counsel for the appellee in the original proceeding is sufficient. The proceeding in review is a part of the original case, and for the purpose of the review the parties are still in court. The proceeding in review is intended to be speedy and summary, and a reasonable notice to counsel accomplishes the ends of justice. *Ibid.*

If the service of the petition is defective, it is cured by an appearance and the filing of an answer. *Ibid.*

The respondent may demur to the petition. Objections available under a general demurrer are open to a party under a special demurrer, as every special demurrer is also a general demurrer, and it is a universal rule that a demurrer, whether special or general, admits only what is well pleaded. *Littlefield v. Del. & Hudson Canal Co.*, 4 B. R. 257.

Objections to the answer for insufficiency may be taken by an exception. *Sutherland v. Kellogg*, 2 Biss. 405.

The circuit court has territorial jurisdiction to hear the petition in review in chambers at any place within the district. *Thornhill v. Bank*, 5 B. R. 367; s. c. 1 Woods, 1.

The district judge can not sit as a member of the circuit court in the exercise of its revisory powers. *Nelson v. Carland*, 1 How. 265.

The circuit judge has power in vacation at his chambers, though outside of the district, to entertain and act upon the petition of review. *Markson v. Heaney*, 1 Dillon, 511, note.

When the revisory jurisdiction of the circuit court is invoked over the decision of the district court, upon a question of fact, the burden is on the petitioner for review to show error in the decision. It is not sufficient merely to show such a condition of the testimony in the case, that different minds, with equal fairness, might possibly arrive at different

conclusions; but to show more nearly in analogy to the case of a motion for a new trial that the evidence can not support the finding. *Coggeshall v. Potter*, 4 B. R. 73; s. c. 6 B. R. 10; s. c. 1 *Holmes*, 75; *Wells v. Dalrymple*, 15 I. R. R. 59; in re *Joseph Mooney*, 15 B. R. 456.

A finding of fact upon an examination of witnesses in the presence of the district court, where the opportunity for judging correctly of the credibility of the witnesses and weight of the testimony is better than can ordinarily be afforded by an inspection of the testimony when reduced to writing, should not be reversed without a very clear and decided conviction that it is erroneous. *Samson v. Clarke*, 6 B. R. 403; s. c. 9 *Blatch*, 372; in re *Cornwall*, 6 B. R. 305; s. c. 9 *Blatch*, 114; in re *Picton*, 11 B. R. 420; s. c. 2 *Dillon*, 548.

When it appears from the record that an amendment of the record was made upon proofs satisfactory to the district court, the circuit court is bound to presume that the evidence offered in support of the amendment was legal and sufficient. It must presume that the bankruptcy court acted in good faith. The amended record can not be impeached in a circuit court. *Ala. & Chat. R. R. Co. v. Jones*, 7 B. R. 145.

The circuit court sits as a court of equity, and on an inquiry into questions of fact, is not bound to reverse upon strictly legal grounds, if satisfied that the facts are correctly found, and that no injustice has been done. *Samson v. Blake*, 6 B. R. 410; s. c. 9 *Blatch*, 379.

The jurisdiction conferred upon the circuit court is summary in its nature, and is not to be hampered by technical rules. The court has ample power to permit subsequent occurrences to be brought before it, so as to deal with the case as it exists at the time of hearing. In re *Boston R. R. Co.*, 6 B. R. 209; s. c. 9 *Blatch*, 101.

The circuit court, in cases presented for review, is not a court of original jurisdiction, and can not act as if it had original jurisdiction *de facto*. Its only power over proceedings in the district court is that of superintendence and revision simply. No additional evidence can be produced in the circuit court. In re *Great West. Tel. Co.*, 5 *Biss*, 350.

The statute does not make it obligatory upon the circuit court to retry every decision of the district court which a creditor, supposing himself aggrieved, may ask the court to retry. The circuit court, in its discretionary power, may properly conclude that no sufficient case is presented calling for a retrial of the facts. *Bank v. Cooper*, 9 B. R. 529; s. c. 20 *Wall*, 171.

If the question relates to the removal of an assignee, the circuit court can not appoint an assignee if it decides in favor of a removal, but must remit the matter to the district court, requiring that court to remove the assignee and to appoint another in his place. In re *Perkins*, 8 B. R. 56; s. c. 5 *Biss*, 254.

If a sale is made free from incumbrances in a case where the district court had no jurisdiction over the party holding the incumbrance, the money will be returned to the purchaser if the sale is set aside. *Davis v. Railroad Co.*, 13 B. R. 258; s. c. 1 *Woods*, 661.

Where property is unlawfully taken from the possession of a receiver

and sold, the circuit court, on reversing the decree of the district court, will declare the sale void. *Ibid.*

The power to stay proceedings in the district court pending a review is a matter in the discretion of the court, and ought not to be exercised unless it is shown that the plaintiff in the review will otherwise be prejudiced or seriously endangered in his rights. *In re Oregon B. P. & P. Co.*, 14 B. R. 304; s. c. 3 Saw. 529.

ACTS OF 1867, 1874, § 4987. The several supreme courts of the Territories shall have the same general superintendence and jurisdiction over the acts and decisions of the justices thereof in cases of bankruptcy as is conferred on the circuit courts over proceedings in the district courts.<sup>1</sup>

Statute revised — June 30, 1870, ch. 177, § 1, 16 Stat. 173.

ACTS OF 1867, 1874, § 4988. In districts which are not within any organized circuit of the United States, the powers and jurisdiction of a circuit court in bankruptcy may be exercised by the district judge.

Statute revised — March 2, 1867, § 49, 14 Stat. 541.

§ 4989. No appeal or writ of error shall be allowed in any case arising under this Title from the circuit courts to the supreme court, unless the matter in dispute in such case exceeds<sup>2</sup> five thousand dollars.

Statute revised — March 2, 1867, ch. 176, § 9, 14 Stat. 520.

Decrees in equity, in order that they may be re-examined in the supreme court, must be final decrees rendered in term time as contradistinguished from mere interlocutory decrees or orders which may be entered at chambers, or, if entered in court, are still subject to revision at the final hearing. No appeal lies to the supreme court from a decree of the circuit court rendered in the exercise of its special supervisory jurisdiction. *Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65; *Hall v. Allen*, 9 B. R. 6; s. c. 12 Wall. 452; *Mead v. Thompson*, 8 B. R. 529; s. c. 15 Wall. 635; *Coit v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274; *Nelson v. Carland*, 1 How. 265.

The judgment of the circuit court in allowing or rejecting a claim is final, and no appeal lies therefrom. *Wiswall v. Campbell*, 5 B. R. 421; s. c. 93 U. S. 347.

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<sup>1</sup> Vide § 4978. <sup>2</sup> So amended by act of Feb. 16, 1875, ch. 77, § 3, 18 Stat. 316.



An appeal does not lie from a decision of the circuit court affirming a decision of the district court upon a motion to set aside an adjudication. *Sandusky v. National Bank*, 12 B. R. 176; s. c. 23 Wall. 289.

If the circuit court decides that it has no jurisdiction to entertain a bill of review, the supreme court may entertain an appeal from such decision, not for the purpose of reviewing, but for the purpose of correcting an erroneous decision respecting the power of the circuit court, and enabling the party to be heard on his application. *Bank v. Cooper*, 9 B. R. 529; s. c. 20 Wall. 171.

Concurrent jurisdiction with the district courts of all suits at law or in equity, are the words of section 4979, showing conclusively that the jurisdiction intended to be conferred upon the district courts is the regular jurisdiction between party and party, as described in the judiciary act and the third article of the Constitution. Cases arising under that clause, where the amount is sufficient, are plainly within the section, and may be removed to the supreme court for re-examination. The jurisdiction is of the same character as that conferred upon the circuit courts by the eleventh section of the judiciary act, and it follows that final judgments in civil actions and final decrees in suits in equity may be re-examined in the supreme court, under this section, when properly removed by writ of error or appeal, as required by existing laws. *Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65; *Colt v. Robinson*, 9 B. R. 289; s. c. 19 Wall. 274.

In all cases where concurrent jurisdiction is vested in the circuit and district courts, either party, where the proceeding is correct, may remove the cause in a proper case, when it has proceeded to final judgment or decree, into the supreme court for re-examination, as provided in other controversies outside of the bankruptcy act. *Smith v. Mason*, 6 B. R. 1; s. c. 14 Wall. 419; s. c. 5 L. T. B. 7; *Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205; *Morgan v. Thornhill*, 5 B. R. 1; s. c. 11 Wall. 65.

Suits in equity, as well as actions at law, may be commenced and maintained in the district courts, and final decrees in such suits in equity, as well as final judgments in such civil actions, where the debt or damage as claimed amounts to more than \$500, may be re-examined in the circuit courts, and the final decrees and judgments rendered in the circuit courts in such cases, where the sum or value exceeds \$5,000, may be re-examined in the supreme court, by appeal or writ of error, as provided in the judiciary act, and the act allowing appeals in cases of equity, and of admiralty and maritime jurisdiction. *Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205; *Stickney v. Wilt*, 11 B. R. 97; s. c. 23 Wall. 150.

The supreme court can not entertain an appeal from the district court, although there is no circuit court for the district. *Crawford v. Points*, 13 How. 11.

The supreme court possesses no revising power over the decrees of the district court sitting in bankruptcy. In *re William Christy*, 3 How. 292; *Crawford v. Points*, 13 How. 11.

On an application for a prohibition against the district court, allegations of facts, not found in the proceedings of the district court, can not

be considered, for the application must be made on the ground that the district court has transcended its jurisdiction in entertaining those proceedings, and whether it has or not must depend, not upon facts stated dehors the record, but upon those stated in the record upon which the district court was called to act, and by which alone it could regulate its judgment. *In re William Christy*, 3 How. 292.

When the judgment is joint, all the parties against whom it is rendered must join in the writ of error, and in chancery cases all the parties against whom a joint decree is rendered must join in the appeal. The remedy by summons and severance, when one party refuses to join in a writ of error, has fallen into disuse in modern practice, but formerly it was allowed generally, when more than one person was interested jointly in a cause of action or other proceeding, and one of them refused to participate in the legal assertion of the joint rights. In such case the other party issued a writ of summons, by which the one who refused to proceed was brought before the court, and if he still refused, an order of judgment of severance was made by the court, whereby the party who wished to do so could sue alone. This remedy was applied to writs of error, when one of the plaintiffs refused to join in assigning errors, and, in principle, is applicable to cases where there is a refusal to join in an appeal. No importance is attached to the technical mode of proceeding called summons and severance. It is sufficient if it appears in any way by the record, that the other party has in any way been notified in writing to appear, and that he has failed to appear, or if appearing, has refused to join. The record must show a written notice and due service, or his appearance and refusal, and that the court, on that ground, granted an appeal to the party who prayed for it as to his own interest. *Masterson v. Herndon*, 5 B. R. 130; s. c. 10 Wall. 416.

It is evident that section 1007, so far as it affects a supersedeas and stay of execution, can not be literally complied with in cases of appeal. Only the spirit of the act can in many particulars be carried out. In cases of appeal, the appeal may be taken orally in court. No written application need be made either in court or to the judge. In such a case a copy of the writ of error, or a copy of anything like a writ of error, or analogous to it can not be filed. But it is evident that something must be done by the appellant within sixty days, in order to comply with the spirit of the act — that is, he must take his appeal, and present his bond to the court or judge within that time, and he must file in the clerk's office, either the bond or some other paper, or an entry must be made upon the minutes of the court, or something else must be done to show that the appeal has been taken within sixty days. The allowance of the appeal relates back to the time when the original application was made for an appeal. The appeal suspends the operation of the judgment of the circuit court rendered on an appeal from the district court, and consequently holds the matter in statu quo, as if the judge of the circuit court were holding the matter under advisement, and had not made any order in the case. This is the effect of the appeal as a supersedeas; consequently all facts made or done by either court, after the appeal has been applied for,

are vacated by an allowance of the appeal. *Thornhill v. Bank*, 5 B. R. 377; s. c. 1 L. T. B. 287.

The object of a citation is to give notice of the removal of the cause, and such notice may be waived by entering a general appearance by counsel. Where an appearance is entered, the objection that notice has not been given is a mere technicality, and the party availing himself of it should, at the first term as he appears, give notice of the motion to dismiss, and that his appearance is entered for that purpose. After the lapse of the term the motion is too late. *Buckingham v. McLean*, 13 How. 151; s. c. 3 McLean, 185.

Want of notice of an appeal comes too late after a general appearance. *Smith v. Mason*, 6 B. R. 1; s. c. 14 Wall. 419; s. c. 5 L. T. B. 7.

No appeal lies unless the decree is final, and a decree which directs an account to be taken of certain rents and profits is not final. *Crawford v. Points*, 13 How. 11.

A case can not be properly taken to the supreme court until a final decree is entered as between all the parties. *Buckingham v. McLean*, 13 How. 151; s. c. 3 McLean, 185.

Where a portion of the evidence has been lost, and is not inserted in the record, the supreme court will decide the case upon what remains. *Ibid.*

If the circuit court renders a judgment or decree in favor of the party instituting the suit, in a case where it is without jurisdiction, the supreme court will reverse the judgment or decree and remand the cause with directions to dismiss the suit. *Stickney v. Wilt*, 11 B. R. 97; s. c. 23 Wall. 150.

If the circuit court dismiss a writ of error for want of jurisdiction, a writ of error will not lie from the supreme court to the circuit court. Appellate courts under such circumstances do not determine the questions presented in the bill of exceptions filed in the district court, as those questions have not been re-examined in the circuit court, and the supreme court is not inclined to re-examine any such questions coming up from the district court until they have first been passed upon by the circuit court. Consequently the question whether a writ of error will lie from the supreme court to the circuit court to examine the rulings of the circuit court, in a case removed into that court from the district court, does not arise, as the record shows that the circuit court never passed upon the questions as to the correctness or incorrectness of the rulings of the district court. *Ins. Co. v. Comstock*, 8 B. R. 145; s. c. 16 Wall. 258.

If the circuit court dismisses a writ of error for want of jurisdiction, a writ of mandamus is the proper remedy, and a writ of error will not lie. *Ibid.*

A defendant may appeal, although he has complied with the decree, by executing a deed as he was thereby directed to do. *O'Hara v. MacConnell*, 93 U. S. 150.

A deed executed after a decree and apart from it, is no bar to an appeal, although it gives the appellee the same right as the decree. *Ibid.*

If no order, decree or action is had on a petition and answer filed after

the decree, but before the entry of the appeal, they can not be considered on appeal. *Ibid.*

**ACT OF 1898, CH. 4, § 30. Rules, Forms, and Orders.**—(a) All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

**ACT OF 1867, § 4990.** The general orders in bankruptcy heretofore adopted by the justices of the supreme court, as now existing, may be followed in proceedings under this Title; and the justices may, from time to time, subject to the provisions of this Title, rescind and vary any of those general orders, and may frame, rescind, or vary other general orders for the following purposes:

First. For regulating the practice and procedure of the district courts in bankruptcy, and the forms of petitions, orders, and other proceedings to be used in such courts in all matters under this Title.

Second. For regulating the duties of the various officers of such courts.

Third. For regulating the fees payable and the charges and costs to be allowed,<sup>1</sup> with respect to all proceedings in bankruptcy before such courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings.

Fourth. For regulating the practice and procedure upon appeals.

Fifth. For regulating the filing, custody and inspection of records.

Sixth. And generally for carrying the provisions of this Title into effect.

All such general orders shall from time to time be reported to Congress, with such suggestions as the justices may think proper.

<sup>1</sup>And said justices shall have power under said sections, by general regulations, to simplify, and so far as in their judgment will conduce to the benefit of creditors, to consolidate the duties of the register, assignee, marshal, and clerk, and to reduce fees, costs, and charges, to the end that prolixity, delay, and unnecessary expense may be avoided.

Statute revised — March 2, 1867, ch. 176, § 10, 14 Stat. 521. Prior Statute — August 19, 1841, ch. 9, § 6, 5 Stat. 445.

**Practice in Bankruptcy.**— A court of bankruptcy is *sui generis* in its nature, and its practice is controlled by the laws which created it, aided

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<sup>1</sup> So amended by act of June 22, 1874, ch. 390, § 18, 18 Stat. 184.

by such light as may be thrown upon them by the reported decisions under similar statutes. In *re Strauss*, 2 B. R. 48; in *re Julius L. Adams*, 2 B. R. 95; s. c. 36 How. Pr. 51; s. c. 2 Ben. 503.

Proceedings in the bankruptcy case proper are regarded as proceedings in equity, and are to be governed by the rules and analogies of equity jurisprudence. In *re Schuyler*, 2 B. R. 549; s. c. 3 Ben. 200; s. c. 2 L. T. R. 85.

The justices of the supreme court are required, subject to the provisions of the act, to frame general orders for carrying the provisions of the act into effect, but they are not authorized to extend their operation beyond the limits prescribed by the act itself. In *re L. Glaser*, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. B. 57.

This section does not confer on the justices the power to create or cause to be created a new office and to confer upon such officer powers which by the letter of the act are expressly conferred upon officers created thereby. In *re Phillip Rein*, 49 How. Pr. 301.

**Establishment of Fees.**—The justices can not allow larger fees than those now given for similar services in other proceedings. In *re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9; in *re J. H. Robinson*, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.

The power of the justices of the supreme court to prescribe fees, commissions, charges, and allowances for the officers, agents, marshals, messengers, assignees, and registers in cases of bankruptcy is plenary, with the limitation that the fees can not exceed the rate allowed by law at the time of the enactment of the revised statutes for similar service in other proceedings. In *re Johnson & Hall*, 12 B. R. 345.

The supreme court can not regulate the reasonable compensation to be allowed to the assignee for his services. In *re Colwell*, 15 B. R. 92.

**ACT OF 1898, CH. 1, § 1. Commencement of Proceedings.**—(10) "Date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed.

**ACT OF 1867, § 4991.** The filing of the petition for an adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, shall be deemed to be the commencement of proceedings in bankruptcy.

Statute revised — March 2, 1867, ch. 176, § 38, 14 Stat. 535.

The order referred to in this provision must mean the order adjudicating the debtor a bankrupt. In *re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508.

The filing of the petition is the commencement of the proceedings. The deposit of \$50 to secure the register's fees, is merely an act preliminary to the issue of the warrant. In *re C. H. Preston*, 6 B. R. 545.

The proceedings in bankruptcy are not commenced until the petition is actually filed, although it was previously made, signed, and verified.

**Wells v. Brackett**, 30 Me. 61; **in re Hill & Van Valkenberg**, 5 Law Rep. 326.

Where the petition in involuntary bankruptcy is presented to the judge, and the orders signed by him on one day, but are not actually deposited in the clerk's office until the following day, when the papers are marked as filed upon the preceding day, it will be deemed to have been filed on such preceding day. **Frank v. Houston**, 9 Kans. 406.

It is not the filing of every petition that is deemed the commencement of proceedings, but the filing of a petition upon which an order of adjudication may be made by the court. **In re Davis Rogers**, 10 B. R. 444; s. c. 1 Cent. L. J. 470.

The filing of a petition in involuntary bankruptcy, unsupported by any proof of the act of bankruptcy or of the creditor's claim, does not constitute the commencement of proceedings in bankruptcy. *Ibid.*

§ 4992. The proceedings in all cases of bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection. Copies of such records, duly certified under the seal of the court, shall in all cases be presumptive evidence of the facts stated therein.

Statute revised — March 2, 1867, ch. 176, § 38, 14 Stat. 535. Prior Statutes — April 4, 1800, ch. 19, § 51, 2 Stat. 34; Aug. 19, 1841, ch. 9, § 13, 5 Stat. 448.

A copy of an order of adjudication certified to by a register is not properly authenticated, and is not admissible as evidence in a collateral action. **Adams v. Wait**, 42 Vt. 16.

A copy of the record is only *prima facie* and not conclusive evidence of a fact, and may be contradicted by parol or any other competent testimony. **Fehley v. Barr**, 66 Penn. 196; **Rugan v. West**, 1 Binn. 263; **Blythe v. Johns**, 5 Binn. 217. *Vide* **Wood v. Grundy**, 3 H. & J. 13; **Barney v. Patterson**, 6 H. & J. 182.

The original papers in proceedings in bankruptcy are admissible in evidence for the purpose of proving the declarations of the bankrupt. **Clayton v. Siebert**, Brewst. 176.

The certificate may be made by the clerk of the court. **Clayton v. Hamilton**, 37 Tex. 269.

Where all the papers given in evidence during the trial of the cause, except depositions, are sent out with the jury, the record of the proceedings in bankruptcy may be sent out, although it contains depositions, for the record can not be divided. **Shomo v. Zeigler**, 78 Penn. 357.

A duly certified copy of the inventory is competent evidence against the bankrupt without the production of the entire record. **Dupuy v. Harris**, 6 B. Mon. 534.

The transcript of the proceedings in bankruptcy, under the seal of the district court and attested by the clerk, and accompanied by a certificate of the district judge that the attestation is in due form, is admissible as evidence in the courts of another State. *Redman v. Gould*, 7 Blackf. 361.

A copy of the docket entries is competent evidence, for the short memorandum is the recording required by the statute, and, consequently, is the documentary evidence of the proceedings. *Berghaus v. Alter*, 5 Penn. 507.

A copy of the record which purports to give a full record of everything which had transpired in the court up to its date, is admissible in evidence, although the proceedings are not finished, where the only object of the record is to prove the time of the filing of the petition. *State v. Rollins*, 13 Mo. 179.

If a fraudulent vendee sells the goods to a third person, his subsequent petition and adjudication are not competent evidence against such purchaser. *Haskins v. Warren*, 115 Mass. 514.

The record of the proceedings in bankruptcy, attested by the clerk of the district court, without any certificate of the presiding judge, is sufficient. *Murray v. Marsh*, 2 Hay (N. C.), 290.

In actions depending upon the bankruptcy of a stranger, there must be proof of the proceedings in bankruptcy, the act of bankruptcy, and the petitioning creditor's debt. *Waterman v. Robinson*, 5 Mass. 303; *Belden v. Edwards*, 2 Day, 246; *Farrington v. Farrington*, 4 Mass. 237.

The proceedings in bankruptcy do not constitute an integral record, but a copy of any portion thereof, duly authenticated as a separate record, is prima facie evidence of the facts stated therein. *Michener v. Payson*, 13 B. R. 49; s. c. 8 C. L. N. 17; s. c. 2 W. N. 339.

A copy of part of the record is not competent evidence against a person who was not a party to the record. *Wilson v. Harper*, 5 Rich. (N. S.) 294.

To prove an order in a particular proceeding in a bankruptcy case, it is not necessary to produce the whole record of that case, but only the whole record of that particular proceeding. *Payson v. Brooke*, 1 W. N. 89.

A copy of a bankrupt's schedule containing an admission of his liability on a note is not competent evidence against a joint obligor. *Wilson v. Harper*, 5 Rich. (N. S.) 294.

To establish the bankruptcy of the debtor, the production of the proceedings against him as a bankrupt is not alone sufficient. Proof of his being a trader, of the act of bankruptcy, and of the petitioning creditor's debt is also necessary. *Hart v. Strode*, 2 A. K. Marsh. 115; *Den v. Wright*, Pet. C. C. 64.

When an adjudication of bankruptcy is proved, the party who alleges that the proceedings have been dismissed, must prove the time of dismissal. *Wills v. Clafin*, 13 B. R. 437; s. c. 92 U. S. 135.

If several papers are attached to the clerk's certificate by ordinary tape, without any mark by which their identity can be established, the transcript is not admissible. *Pike v. Orehore*, 40 Me. 503.

ACT OF 1898, CH. 5, § 33. **Creation of Two Offices.**— (a) The offices of referee and trustee are hereby created.

**ACT OF 1898, CH. 5, § 34. Appointment, Removal, and Districts of Referees.**— (a) Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

**§ 37. Number of Referees.**— (a) Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

**ACT OF 1867, § 4993.** Each district judge shall appoint upon the nomination and recommendation of the Chief Justice of the supreme court, one or more registers in bankruptcy when any vacancy occurs in such office, to assist him in the performance of his duties under this Title, unless he shall deem the continuance of the particular office unnecessary.

Statute revised — March 2, 1867, ch. 176, § 3, 14 Stat. 518. Prior Statute — Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

**ACT OF 1898, CH. 5, § 35. Qualifications of Referees.**— (a) Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

**ACT OF 1867, § 4994.** No person shall be eligible for appointment as register in bankruptcy, unless he is a counsellor of the district court for the district in which he is appointed, or of some one of the courts of record of the State in which he resides.

Statute revised — March 2, 1867, ch. 176, § 3, 14 Stat. 518.

**ACT OF 1898, CH. 1, § 1. \* \* \* Officer.**— (18) "Officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing



of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer. \* \* \* (21) "Referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead.

CH. 5, § 36. **Oaths of Office of Referees.**— (a) Referees shall take the same oath of office as that prescribed for judges of United States courts.

§ 50. **Bond of Referees.**—(a) Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

ACT OF 1867, § 4995. Before entering upon the duties of his office, every person appointed a register in bankruptcy shall give a bond to the United States, for the faithful discharge of the duties of his office, in a sum not less than one thousand dollars, to be fixed by the district judge, with sureties satisfactory to such judge; and he shall, in open court, take and subscribe the oath prescribed in section seventeen hundred and fifty-six, Title PROVISIONS APPLICABLE TO SEVERAL CLASSES OF OFFICERS, and also an oath that he will not, during his continuance in office, be, directly or indirectly, interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy, in either the district or circuit court in his district.

Statute revised — March 2, 1867, ch. 176, § 3, 14 Stat. 518.

ACT OF 1898, CH. 5, § 39. **Duties of Referees.**— \* \* \*. (b) Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

ACT OF 1867, § 4996.<sup>1</sup> — No register or clerk of court, or any partner or clerk of such register or clerk of court, or any person

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<sup>1</sup> So amended by act of June 22, 1874, ch. 390, § 18, 18 Stat. 184.

having any interest with either in any fees or emoluments in bankruptcy, or with whom such register or clerk of court shall have any interest in respect to any matter in bankruptcy, shall be of counsel, solicitor, or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, or in an appeal therefrom. Nor shall they or either of them, be executor, administrator, guardian, commissioner, appraisor, divider, or assignee of, or upon any estate within the jurisdiction of either of said courts of bankruptcy; nor be interested, directly or indirectly, in the fees or emoluments arising from either of said trusts.

Statute revised — March 2, 1867, ch. 176, § 4, 14 Stat. 519.

The formal receipting for a dividend check, or the filing of the blanks in a case of involuntary bankruptcy, when done gratuitously as a favor to a friend, is not within the spirit of this provision. *Ex parte Binswanger*, E. D. Mo.

A register may purchase property at a sale by an assignee. *Ibid*.

ACT OF 1898, CH. 5, § 34. **Removal of Referees.**— Courts of bankruptcy may in their discretion remove referees because their services are not needed or for other cause.

ACT OF 1867, § 4997. Registers are subject to removal from office by the judge of the district court.

Statute revised — March 2, 1867, ch. 176, § 5, 14 Stat. 518.

On the suggestion of a credible person, that any officer of the court whom the court has power to remove, has been guilty of offenses either of omission or commission, it is necessary that an inquiry should be made, so that the purity of judicial administration shall be maintained. Ordinarily, investigations instituted for public ends, as in criminal cases, are conducted at public expense. But if a party who institutes a private complaint fails to sustain it, he must pay the costs. *Ex parte Binswanger*, E. D. Mo.

It is impossible to prescribe a standard of official courtesy. It is only when a register is unfitted by temper or otherwise to observe the manners and bearing due his office, or fails to observe them, that his official conduct calls for review. *Ibid*.

There is no objection to a register's employing a short-hand reporter to reduce examinations to writing when he pays him out of his own fees. *Ibid*.

ACT OF 1898, CH. 5, § 38. **Jurisdiction of Referees.**—(a) Referees respectively are hereby invested, subject always to a review by

the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

**§ 39. Duties of Referees.**— (a) Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable

to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

The register, under the law of 1867, had power to make a valid adjudication in an involuntary case where the alleged bankrupt has made default. *In re Deford*, 18 B. R. 554.

Under the law of 1867, it was held that a register had no authority to set off exempt property to the bankrupt, nor to direct the assignee in the matter. *In re Peabody*, 16 B. R. 243.

Acts of 1867 and 1874, § 4998. Every register in bankruptcy has power: (a)

First. To make adjudication of bankruptcy in cases unopposed.

Second. To receive the surrender (b) of any bankrupt.

Third. To administer oaths in all proceedings before him.

Fourth. To hold and preside at meetings of creditors.

Fifth. To take proof of debts.

Sixth. To make all computations of dividends, and all orders of distribution.

Seventh. To furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case.

Eighth. To audit (c) and pass accounts of assignees.

Ninth. To grant protection.(d)

Tenth. To pass the last examination (e) of any bankrupt in cases whenever the assignee or a creditor do not oppose.

Eleventh. To sit in chambers and dispatch there such part (f) of the administrative business of the court and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct.

Statute revised - March 2, 1867, ch. 176, § 4, 14 Stat. 518.

(a) A register can not delegate to his clerk any authority to take and pass upon proofs, or to determine the sufficiency of schedules, or to do any other act than such as is purely clerical. *Ex parte Binswanger*, E. D. Mo.

(b) After passing the order of adjudication, the register, in voluntary cases, upon the request of the bankrupt, is authorized and required to re-

ceive the surrender of the property, and keep it safely until it can be turned over to the assignee. In *re Hasbrouck*, 1 B. R. 75; s. c. 1 Ben. 402.

The fact that the bankrupt has a prospect of effecting a settlement with his creditors, is not a sufficient reason for delaying to make a surrender of his property. The court may, in a proper case, order such surrender to be made. In *re Shafer & Hamilton*, 2 B. R. 586.

In proper cases the register may appoint a watchman to take charge of the property. In *re Bogert & Evans*, 2 B. R. 585; in *re Shafer & Hamilton*, 2 B. R. 586.

The register may pass an order directing the bankrupt to deliver all cash on hand to the custodian appointed by him, and in case of refusal, the court will enforce it by an attachment for contempt. In *re F. & A. Speyer*, 6 B. R. 255; s. c. 42 How. Pr. 397; in *re Kempner*, 6 B. R. 521.

If the marshal has property in his possession and actual custody as the property of the bankrupt, it is proper that it should be insured in such sums and for such time as shall seem proper to the register, and an order of the court will, upon application, be passed for that purpose. In *re Carow*, 4 B. R. 543; s. c. 41 How. Pr. 112.

The register, by special order, may be directed to sell property and execute a conveyance therefor. A sale may also be made by authority of the court under a disputed judgment, and the deed may be made by the referee. In *re Hannah*, 5 B. R. 292.

(c) Under the power conferred by this clause and Rule V, the register is authorized to pass an order requiring the assignee to make his return. In *re Bellamy*, 1 B. R. 64; s. c. 1 Ben. 390; s. c. 1 L. T. B. 22.

The duty enjoined upon the register is to audit, not simply to adjudicate — to hear and examine, not on one side only, but on both sides. The duty is not only judicial, but ministerial, administrative. There is no statute or judicial writing in which the word "audit" is applied to the action of a court. *Ex vi termini* it implies executive as well as judicial action. If the act of auditing implied only judicial action, no more would be required of the register than that he take such evidence as the parties see fit to submit, and pass upon the same, basing his decision upon such evidence alone. But an auditing officer proceeds to examine an account for the purpose of ascertaining in any way he may be able, without regard to established forms or technical rules, what sum ought in fairness be allowed. This is the course universally pursued by the auditing officers of corporations, civil or municipal, and it has grown into an established usage or custom. The word, as used in the act and rules, is used in this accepted sense as there is no other established sense in which it can be used. The court, as its first act, seizes upon the estate of the debtor, brings the same within its jurisdiction and control, and thereby charges itself with the duty of a just, full, and complete administration of the estate in the interests of all concerned. The duties executive in their character devolve upon the courts in bankruptcy. To relieve the judge of the variant and sometimes apparently conflicting duties of a judicial and ministerial officer, a new class of officers is called into being, who are especially charged with the administrative duties of the court. These officers are deprived of

the strict judicial function of deciding an issue duly framed, but upon them are devolved only those quasi judicial functions which the act calls "administrative duties." Auditing the accounts of an assignee is among those administrative acts which pertain thus peculiarly to the register. In auditing an account, the register may, therefore, cross-examine all witnesses, and summon such other witnesses as he may deem proper. In *re John J. Staff*, 43 How. Pr. 110; s. c. 5 Ben. 574; in *re Abraham B. Clark*, 9 B. R. 67.

An account to which a witness refers in his testimony may properly be regarded as evidence of the items of alleged services and disbursements, but the items must be explained as to the occasion and necessity and value of the services, and the occasion and necessity and amount of the disbursements, and how they came to be rendered and made, and whether they are in any part proper items for the account, or whether they ought to be compensated through some other form of proceeding. In *re John J. Staff*, 43 How. Pr. 110; s. c. 5 Ben. 574.

Quære, Can an attorney for the assignee retain moneys collected by him until his fees are paid? In *re John J. Staff*, 42 How. Pr. 414.

The register should proceed to audit the accounts without first requiring that moneys in dispute shall be deposited in bank. When the accounts are audited, such order may be made as may seem necessary. *Ibid*.

When no reason is shown why an assignee should make an amendment to his return, how such an amendment is proper or necessary, or what particular object is to be subserved by his making it, or what interest of the bankrupt is to be promoted by making it, or to be injured by not making it, he will not be required to make it. In *re Kingon*, 3 B. R. 446; s. c. 38 How. Pr. 392.

The register has the power to order the payment of fees and expenses incurred in the proceedings, out of funds in the hands of the assignee. In *re Lane*, 2 B. R. 309; s. c. 3 Ben. 98.

(d) This undoubtedly means protection to the bankrupt from being arrested in cases where he is not liable to arrest. In *re L. Glaser*, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. B. 57.

(e) In some districts it is the practice of the registers, where no party demands the examination of the bankrupt, to examine him of their own accord. For a specimen of such an examination, vide 1 B. R. 135. In *re Sherwood* (note), 1 B. R. 344; s. c. 6 Phila. 461. Vide, also, Rule VII; in *re Brandt*, 2 B. R. 215; in *re Wm. H. Long*, 3 B. R. (quarto) 66.

When the bankrupt asks to be discharged, he must submit himself, if required, to be examined, with a view to show whether he has made a full and fair surrender. In *re Brandt*, 2 B. R. 215.

There is no last examination in bankruptcy, nor any examination at all, unless specially ordered. *U. S. v. Clark*, 4 B. R. 59; s. c. 1 L. T. B. 237; s. c. 3 L. T. B. 223.

(f) Under this clause and Form No. 4, the register to whom a case is referred has all the powers of the district court, except to commit for contempt, or decide any question concerning the allowance of a discharge.

unless an issue of law or fact is raised and contested by a party to the proceedings. In *re Gettleston*, 1 B. R. 604; in *re Lanier*, 2 B. R. 154; in *re Brandt*, 2 B. R. 215.

The proceedings before a register are to be conducted by him with the exercise of proper legal discretion, and, subject to that rule, are entirely within his control. If a party refuses to proceed, the case must proceed without him. No general inflexible law can be laid down in respect to adjournments or postponements. Every case must be treated on its own merits, and according to the best judgment of the register. In *re Hyman*, 2 B. R. 333; s. c. 36 How. Pr. 282; s. c. 3 Ben. 28.

When a matter is specifically referred to the register for examination, he can not inquire into the capacity of the parties to litigate. His duty is to take the proofs under the order of reference, and he is bound to consider that every question as to the competency of the party to present the objections, and of regularity in their reception and reference, has been acted on and disposed of by the court. In *re Brown King*, 1 N. Y. Leg. Obs. 22; s. c. 4 Law Rep. 320.

If the bankrupt is a party to a submission of a controversy to a register, he is bound by the decision in a collateral action. *Johnson v. Worden*, 13 B. R. 335; s. c. 47 Vt. 457.

If a register determines the amount due on a claim without hearing the claimant, or appointing a time for hearing, his determination is not conclusive, although the claimant and the assignee agreed to leave it to him for adjustment. *Moran v. Bogert*, 14 B. R. 393; s. c. 16 Abb. Pr. (N. S.) 303; s. c. 10 N. Y. Supr. 603.

ACT OF 1898, CH. 5, \* \* \* § 43. **Referee's Absence or Disability.**— (a) Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

ACT OF 1898, CH. 4, \* \* \* § 41. **Contempts before Referees.**— (a) A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

(b) The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

Where an order is, in effect, a final order for payment of money, whether the proceeding in which it is made is of equitable or legal cognizance, it can not be enforced by imprisonment upon the theory of a contempt. *In re The Atlantic Mut. Life Ins. Co.*, 17 B. R. 368.

ACT OF 1898, CH. 4, § 22. **Reference of Cases after Adjudication.**—(a) After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

(b) The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

ACT OF 1867, § 4999. No register shall have power to commit for contempt, or to make adjudication of bankruptcy when opposed; or to decide upon the allowance or suspension of an order of discharge.

Statute revised — March 2, 1867. ch. 176, § 4. 14 Stat. 519.

ACT OF 1898, CH. 5, § 42. **Records of Referees.**—(a) The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

(b) A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

(c) The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to



by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

ACT OF 1898, CH. 1, \* \* \* **Clerk.**—(5) “Clerk” shall mean the clerk of a court of bankruptcy.

ACT OF 1867, § 5000. Every register shall make short memoranda of his proceedings in each case in which he acts, in a docket to be kept by him for that purpose, and shall forthwith, as the proceedings are taken, forward to the clerk of the district court a certified copy of these memoranda, which shall be entered by the clerk in a proper minute-book to be kept in his office.

Statute revised — March 2, 1867, ch. 176, § 4, 14 Stat. 519.

ACT OF 1867, § 5001. The judge of a district court may direct a register to attend at any place within the district for the purpose of hearing such voluntary applications under this Title as may not be opposed, of attending any meeting of creditors, or receiving any proof of debt, and generally, for the prosecution of any proceedings under this Title.

Statute revised — March 2, 1867, ch. 176, § 5, 14 Stat. 519.

The register can not fulfill the requirements of his official duty by holding occasional monthly sessions in a county of his district in which he does not reside, on days of his own appointment. He should have an office, attended by himself or resident clerk, where the docket, minutes, and papers of every bankruptcy in such county are securely kept, and are always open during the hours of business to the inspection of those interested. *In re Sherwood*, 1 B. R. 344; s. c. 6 Phila. 461.

For improper conduct a case may be transferred from one register to another. *In re J. O. Smith*, 1 B. R. 243; s. c. 2 Ben. 113.

ACT OF 1867, § 5002. Every register, so acting, shall have and exercise all powers, except the power of commitment, vested in the district court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents.

Statute revised — March 2, 1867, ch. 176, § 5, 14 Stat. 519.

A witness is bound to attend although the summons is served on him in another district, if he does not live more than one hundred miles from the place where the register requires him to attend. *In re Wm. S. Woodward*, 12 B. R. 297; s. c. 10 Pac. L. R. 214.

**ACT OF 1898, CH. 4, § 21. Evidence.**—(a) A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the State in which the proceedings are pending, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act.

(b) The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

(c) Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

(d) Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

(e) A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

(f) A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

(g) A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

**ACT OF 1867, § 5003.** Evidence or examination in any of the proceedings under this Title may be taken before the court, or a register in bankruptcy,  *viva voce* or in writing, before a commissioner of the circuit court, or by affidavit, or on commission, and the court

may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony in the same manner as in suits in equity in the circuit court.

Statute revised — March 2, 1867, ch. 176, § 38, 14 Stat. 535. Prior Statute — August 19, 1841, ch. 9, § 7, 5 Stat. 446.

The provisions of this section in regard to the taking of testimony, regulate the proceedings with such minute detail that they must be held exclusive. Testimony to be used in a case of involuntary bankruptcy can not be taken on mere notice, but must be taken on commission. In *re Dunn et al.*, 9 B. R. 487; s. c. 12 Blatch. 42.

A commission may, on the application of the assignee, be issued to take the examination of a witness in another State, and if the witness refuses to testify, the circuit court for that State may punish him for a refusal to testify. In *re John J. Johnston*, 14 B. R. 569; s. c. 13 Pac. L. R. 54.

ACTS OF 1867 and 1874, § 5004. All depositions of persons and witnesses taken before a register, and all acts done by him, shall be reduced to writing, and be signed by him, and shall be filed in the clerk's office as part of the proceedings. He shall have power to administer oaths in all cases, and in relation to all matters in which oaths may be administered by commissioners of circuit courts.

Statute revised — March 2, 1867, ch. 176, § 5, 14 Stat. 519.

§ 5005. Parties and witnesses summoned before a register shall be bound to attend in pursuance of such summons at the place and time designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpoena.

Statute revised — March 2, 1867, ch. 176, § 7, 14 Stat. 520. Prior Statute — April 4, 1800, ch. 19, § 15, 2 Stat. 25.

§ 5006. Whenever any person examined before a register refuses or declines to answer, or to swear to or sign his examination when taken, the register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, and to punish him for contempt, if such person be com-

pellable by law to answer such question or to sign such examination. See *ante*, Act of 1898, ch. 5, § 41.

Statute revised — March 2, 1867, ch. 176, § 7, 14 Stat. 520. Prior Statute — April 4, 1800, ch. 19, §§ 14, 25, 2 Stat. 25, 28.

Where a commission issued by another court is not accompanied by interrogatories, and does not furnish any information as to what the inquiry is to which the examination of the witness is to be directed, it is impossible to determine whether the questions which the witness refuses to answer are or are not pertinent to the inquiry, and an attachment can not be granted. In re S. Glaser, 2 B. R. 398.

A creditor, though the wife of the bankrupt, is a competent witness. In re Richards, 17 B. R. 562.

Bankruptcy proceedings are matters of record, though not required to be recorded at large. Copies duly certified by the clerk, under seal of the court, are in all cases and in all courts of the country *prima facie* evidence of the facts stated therein. *Turnbull, Jr. v. Payson, Assignee*, 16 B. R. 440.

Act of Congress of 1790, in relation to authentication of records, does not relate to proceedings in the Federal courts. *Miller v. Chandler*, 17 B. R. 251.

A certificate of discharge signed by the judge, and attested under the seal of the court, is not only sufficiently authenticated, but is precisely the means by which the bankrupt is to prove and to have the benefit of his discharge. (Law of 1867.) *Ibid*.

While a certificate of discharge is conclusive evidence, in favor of the bankrupt, of the regularity of such discharge, it is not so in favor of other parties who seek to use it. *Dewey v. Moyer*, 18 B. R. 114.

ACT OF 1898, CH. 4, § 24. **Transfer of Cases.**— (b) The judge may at any time for the convenience of parties, or for cause, transfer a case from one referee to another.

ACT OF 1867, § 5007. Any register may act in the place of any other register appointed by and for the same district court.

Statute revised — March 2, 1867, ch. 176, § 4, 14 Stat. 519.

ACT OF 1898, CH. 5, § 10. **Compensation of Referees.**— (a) Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one

half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

(b) Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

(c) In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

ACT OF 1867, § 5008. The fees of registers, as established by law or by rules and orders framed pursuant to law, shall be paid to them by the parties for whom the services may be rendered.

Statute revised — March 2, 1867, ch. 176, § 4, 14 Stat. 519.

Under the provisions of this section and Rule XXIX, where the assignee examines the bankrupt before the register, the assignee must pay the fees of the register for such examination, whether he has any assets of the estate or not. In re Hughes, 1 B. R. 226; s. c. 2 Ben. 85; s. c. 1 L. T. B. 45; in re Eldom, 3 B. R. 160.

Parties who call for the examination of the bankrupt or other witnesses, can only be required to pay the fees and expenses for the direct examination. Those who cross-examine the witnesses must pay the fees and expenses of the cross-examination. The rule applies to the matter only as between the register and the parties for whom he renders the services. The court, in the final disposition of the case, will pass such an order in regard to costs as equity shall demand. Schofield v. Moorehead, 2 B. R. 1; in re Mealy, 2 B. R. 128; in re Eldom, 3 B. R. 160.

The fees for the cross-examination, so far as it may be necessary to explain or qualify any matters brought out on the direct examination, which may seem to bear unfavorably upon his conduct or dealings, or which are obscure, must be paid by the party seeking the examination. In re G. N. Noyes, 11 B. R. 111.

If the bankrupt makes further statements after the close of his direct examination, he does so as a witness in his own behalf, and must pay the expenses incurred thereby. In re Mealy, 2 B. R. 128. Contra, in re Macintire, 1 B. R. 11; s. c. 1 Ben. 277.

If a creditor desires that a final examination shall be reduced to writing by the register, he must pay for the services. In re Alfred Jackson, 8 B. R. 424.

The fees to be paid by a creditor for a final examination made at his request, will not embrace the per diem compensation to the register, nor his fee for administering the final oath, or for the certificate of conformity, as these are required to be performed if no creditor appears. *Ibid.*

A register has a lien for fees on the fund in court which has been awarded to the party for whom the services were rendered. In re Breck & Schermerhorn, 13 B. R. 216.

If the register improperly refuses to countersign a check, he is not entitled to a lien on the fund for the services rendered in making up the certificate which the party is thus compelled to take. *In re Philip Rein*, 13 B. R. 551.

The fees of the register for the services under a reference procured by the bankrupt before the appointment of an assignee, for the purpose of contesting a claim offered for proof, may be paid out of the estate. *In re Clementina T. Richardson*, 7 Ben. 155.

ACT OF 1898, CH. 4, § 18. **Trials by Referee.**—(f) If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

(g) Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

ACT OF 1867, § 5009. In all matters where an issue of fact or of law is raised and contested by any party to the proceedings before any register, he shall cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge.

Statute revised—March 2, 1867, ch. 176, § 4, 14 Stat. 519.

The issue of fact or law must be an issue actually raised and existing, and one which has arisen out of proceedings which have taken place, and not an issue likely to arise, or which may be raised thereafter. *In re J. Pulver*, 1 B. R. 46; s. c. 1 Ben. 381.

It is the duty of the register to adjourn the issue into court without any request to that effect by a contesting party. But still such an adjournment is a proceeding which a contesting party may waive, and where he does waive it, by submitting the decision of the issue to the register, he can not, after finding that the question is decided against him, then ask leave to have it adjourned into court. *In re Patterson*, 1 B. R. 100; s. c. 1 Ben. 448.

The ground of objection should be stated, otherwise no point or question or issue is presented or raised. *In re Levy et al.*, 1 B. R. 136; s. c. 1 Ben. 496; *in re Frodenburg*, 1 B. R. 268; s. c. 2 Ben. 133.

An objection to a question or answer, in the course of an examination before a register, does not raise a question or issue of law which can be adjourned into court. *In re Levy et al.*, 1 B. R. 136; s. c. 1 Ben. 496.

As the application by a bankrupt for leave to amend can not be opposed, no issue of fact or law within this section can be raised or contested in regard to it. In *re Watts*, 2 B. R. 447; s. c. 3 Ben. 166; s. c. 2 L. T. B. 74.

An objection to an application for the examination of the bankrupt raises an issue of law which should be adjourned. In *re Patterson*, 1 B. R. 100; s. c. 1 Ben. 448.

An issue of fact or of law raised upon testimony taken in opposition to the proof of a debt, must be adjourned into court. In *re Clark & Bluninger*, 6 B. R. 202.

A party who seeks to review the act of a register must do so in a respectful manner, and if he makes a wanton attack upon his character, he is liable to be punished for contempt. In *re Breck & Schermerhorn*, 13 B. R. 216.

Acts of 1867 and 1874, § 5010. Any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof; and such certificate so signed, shall be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the judge at chambers or in open court.

Statute revised — March 2, 1867, ch. 176, § 6, 14 Stat. 520.

It is only a party to the proceedings who can take the opinion of the district judge on a certificate of the register. The word "party" means the bankrupt or a creditor. It does not mean a witness who is not the bankrupt or a creditor. In *re Fredenburg*, 1 B. R. 268; s. c. 2 Ben. 133; in *Comstock & Co.*, 13 B. R. 193; s. c. 3 Saw. 517.

The act only contemplates the certifying of questions which actually arise. The questions which can be certified are: 1. Any issue of fact or of law raised and contested by any party to the proceedings; but it must be an issue actually raised and existing, and one which has arisen out of the proceedings which have taken place, and not an issue likely to arise or which may be raised thereafter. 2. Any point or matter arising in the course of the proceedings, or upon the result of the proceedings; but it must be a point or matter which has arisen in the course of the proceedings which have taken place, or a point or matter which has arisen upon and after the result of the proceedings which have taken place, and not a point or matter likely to arise or which may be raised thereafter, or after a result shall have been arrived at. 3. Any question stated by consent of the parties concerned in a special case; but it must be a question to which there are two parties, and one which has arisen out of the proceedings which have taken place. Nothing is to be certified or decided except what is necessary to be decided to enable the case to progress properly. Questions which thus necessarily arise are to be decided as and when they thus

arise, and are not to be anticipated. In re J. Pulver, 1 B. R. 46; s. c. 1 Ben. 381; in re J. W. Wright, 1 B. R. 393; in re Sturgeon, 1 B. R. 498; in re Bray, 2 B. R. 139; in re Levy et al., 1 B. R. 136; s. c. 1 Ben. 496.

Objections to questions and answers in the course of an examination, when put in proper form, may be certified. In re Levy et al., 1 B. R. 136; s. c. 1 Ben. 496.

Where the register desires to receive instructions as to his official duty, or in regard to matters pending before him, there is no objection to his adopting a course analagous to that prescribed by this section. In re Sherwood, 1 B. R. 344; s. c. 6 Phila. 461.

If a register improperly refuse an application for leave to amend, the bankrupt can, under this section, take the opinion of the judge on the question, by means of a certificate from the register. In re Watts, 2 B. R. 447; s. c. 3 Ben. 166; s. c. 2 L. T. B. 74.

No opinion will be given on a question improperly certified. In re Sturgeon, 1 B. R. 498; in re J. W. Wright, 1 B. R. 393; in re Bray, 2 B. R. 139.

It has been decided that the following questions can not be certified under this section.

No question concerning the right of a bankrupt to his discharge. In re Mawson, 1 B. R. 265; s. c. 2 Ben. 122.

No question concerning the effect of a discharge to release a particular debt. In re Bray, 2 B. R. 139.

No question as to the disposition that an assignee shall make of certain property before his application for a settlement of his final accounts. In re Sturgeon, 1 B. R. 498.

No question concerning the title to property not arising in a proceeding concerning such property, or in which the assignee is a party. In re J. W. Wright, 1 B. R. 393.

No question concerning the duty of a creditor, claiming security, who has proved his claim as unsecured, not arising on a motion or proceeding before the register. In re Peck, 3 B. R. 757.

No question as to whether it is necessary for a secured creditor to prove his claim before making application to have the security sold; the secured debt not having been proved. In re Stephen V. Haskell, 4 B. R. 558.

ACT OF 1867, § 5011. In any proceedings within the jurisdiction of the court, under this Title, the parties concerned, or submitting to such jurisdiction, may, at any stage of the proceedings, by consent, state any questions in a special case for the opinion of the court, and the judgment of the court shall be final unless it is agreed and stated in the special case that either party may appeal, if, in such case, an appeal is allowed by this Title. The parties may also, if they think fit, agree, that upon the questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, or any property, or the amount of any disputed debt or claim,



shall be paid, delivered, or transferred by one of such parties to the other of them, either with or without costs.

Statute revised — March 2, 1867, ch. 176, § 6, 14 Stat. 520.

Questions agreed upon and stated do not of themselves make a special case within the meaning of this section. This is not the proviso of the section. It is not that parties may make a special case, but it is that they may "state any question or questions in a special case." There must, of course, be, first, parties; and second, a case in which questions can arise and be stated. Questions are to be decided only when they necessarily arise, and are not to be anticipated. *In re Stephen V. Haskell*, 4 B. R. 558.

ACT OF 1867, § 5012. If any judge, register, clerk, marshal, messenger, assignee, or any other officer of the several courts of bankruptcy shall, for anything done or pretended to be done under this Title, or under color of doing anything thereunder, willfully demand or take, or appoint or allow any person whatever to take for him or on his account, or for or on account of any other person, or in trust for him or for any other person, any fee, emolument, gratuity, sum of money, or anything of value whatever, other than is allowed by law, such person shall forfeit and pay a sum not less than three hundred dollars and not more than five hundred dollars, and be imprisoned not exceeding three years.

Statute revised — March 2, 1867, ch. 176, § 45, 14 Stat. 539.

ACT OF 1898, CH. 1, § 1. **Meaning of Words and Phrases.**—

(a) The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (9) "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any

person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things.

ACT OF 1867, § 5013. In this Title the word "assignee," and the word "creditor," shall include the plural also; and the word "messenger" shall include his assistant or assistants, except in the provision for the fees of that officer. The word "marshal" shall include the marshal's deputies; the word "person" (a) shall also include "corporation;" and the word "oath" shall include "affirmation." And in all cases in which any particular number of days is prescribed by this Title, or shall be mentioned in any rule or order of court or general order which shall at any time be made under this Title, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on a Sunday, (b) Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also.

Statute revised — March 2, 1867, ch. 176, § 48, 14 Stat. 540.

(a) This section is not to be construed as applying the word *person* to include any other corporations as subject to the provisions of the act than those described in section 5122. *Adams v. Railroad Co.*, 4 B. R. 314; s. c. 6 A. L. Rev. 365; s. c. 1 Holmes, 30; *Sweatt v. Boston R. R. Co.*, 5 B. R. 234; s. c. 1 L. T. B. 273; in re *Ala. & Chat. R. R. Co.*, 6 B. R. 107; s. c. 9 Blatch. 391; s. c. 5 L. T. B. 76.

(b) Unless Sundays are especially excepted in the statute, they are to be counted. The fair and unavoidable inference from this clause is, that when Sunday is not the last day, it is not to be excluded. In re *York & Hoover*, 4 B. R. 479; s. c. 1 Abb. C. C. 503; s. c. 1 L. T. B. 290.

Adjudication of bankruptcy made November 26, 1867. Application filed November 27, 1868. Held to be in time, as being within the equity and fair construction of section 5013. In re *Lang*, 2 B. R. 480.

## TITLE VII.

### VOLUNTARY BANKRUPTCY.

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**Act of 1898, CH. 1, § 1. Bankrupt, Definition of.—** (4) “Bankrupt” shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt.

**CH. 3, § 4. Who May Become Bankrupts.—** (a) Any person who owes debts, except a corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.

**CH. 4, § 18. \* \* \* Judge or Referee May Hear the Petition.—** Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

**CH. 1, § 1. \* \* \* Petition.—** (20) “Petition” shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named.

**Document.—** (13) “Document” shall include any book, deed or instrument in writing.

**§ 59. Who May File and Dismiss Petitions.—**(a) Any qualified person may file a petition to be adjudged a voluntary bankrupt.

(b) Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

(c) Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

(d) If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

(e) In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

(f) Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

(g) A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.

A partner who joined in a voluntary petition participated actively in the proceedings, and after a lapse of five months moved to set aside the adjudication on the ground that he was induced to join in the petition by fraudulent representations of his copartners; that the firm was not in fact insolvent, etc. Held, that substantial justice does not require that creditors whose rights have become fixed should be subjected to the expense and delay of such investigation, because he might be able to prove the fraud alleged. *In re Court*, 17 B. R. 555.

An adjudication will not be set aside on ground that the petition, which was signed by requisite number of creditors, was procured to be filed by the bankrupt. This is not fraudulent unless followed by a discharge that could not be had on voluntary proceedings. *In re E. L. Matot & Co.*, 16 B. R. 485.

Petition in bankruptcy held defective in not setting out the special authority of the president of a bank, who is one of the petitioning creditors, to sign and verify same on behalf of the bank, his general authority as an officer not being sufficient. *In re Roche et al. v. Fox*, 16 B. R. 461.

Bankruptcy court has jurisdiction to allow an amendment to remedy the defect, where mistakes have been made in setting forth the number of creditors and amount of their claims. *Ibid.*

No creditor who has received a preference, having at the time reasonable cause to believe his debtor insolvent, is authorized to institute proceedings in bankruptcy. *Ecker v. McAllister*, 17 B. R. 42.

So long as a creditor holds ample security on property of debtor, and does not release same, he is not counted as a debtor having a provable debt. *In re Crossette & Graves*, 17 B. R. 208.

But he may at any time release his security as to whole or part of the debt, and if he does so seasonably, before the hearing and decision as to quorum of creditors and debts, he is entitled to be ranked as a creditor having a provable debt and admitted as such in determining whether the requisite number and amount have joined the petition. *Ibid.*

Allegation of indebtedness in an involuntary petition must show that the petitioner is the owner of the claim; that he was still a creditor at the time of filing the petition. *In re The Western Sav. & Trust Co.*, 17 B. R. 413.

Where the original petition was ordered dismissed unless the petitioner, in conjunction with other creditors, should file an amended petition within a specified time, which has been done, and it appears that in the interval the petitioner has assigned his demand, the petition must be dismissed. *Ibid.*

Where name of creditor is stated in petition, asserting a claim by a proper averment, but omitting the amount, the claim may be amended by adding the amount, if done in good faith. *Ibid.*

An indorser of the bankrupt's paper, who has before the filing of the petition become absolutely liable to the holders, by due notice of its dishonor, is not a creditor of the bankrupt at the time of such filing, as his claim is only provable in case of neglect of holder to prove. *In re Riker*, 18 B. R. 393.

Where motion to dismiss has been denied, and the petitioning creditors omit or decline to proceed, any other creditor to the required amount may continue the proceeding. *In re Sheffer*, 17 B. R. 369.

A merchant is under obligation to his creditors to exhibit a statement of his accounts, when demanded, and if he fails to do so he can not complain of proceedings commenced against him without the requisite number of creditors joining in the petition, provided a sufficient number join before trial. *Ferrin & Gaff Mfg. Co. v. Peale*, 17 B. R. 377.

Petition should contain averment that petitioners believe that they constitute proper number, and that the proper amount is due them. It is not required that they should know such to be the fact. *Ibid.*

Any creditor whose interests are directly affected by the proceedings may intervene and contest the allegations of the petition with regard to acts of bankruptcy, notwithstanding the debtor fails to appear on return day. *In re Jonas*, 16 B. R. 452.

A general, unsecured creditor is entitled to intervene and contest a

petition in involuntary proceedings. *In re Austin, Tomlinson & Webster*, 16 B. R. 518.

A creditor who prior to filing of petition has obtained a lien upon the property of alleged bankrupt, by process of mesne attachment, is entitled to intervene and oppose an adjudication. *In re Burton & Watson*, 17 B. R. 212.

Where upon return of order to show cause, or upon the adjourned day, the petitioning creditors fail to appear or to proceed, any other creditors, to the required amount, may intervene and pray an adjudication upon the original petition. Such intervening creditor or creditors need not constitute the required number or value of all the creditors. (*Laws of 1867.*) *In re Sheffer*, 17 B. R. 369.

Certain creditors who had, since the filing of petition, prosecuted to judgment actions against the alleged bankrupts, and made levies under their executions, moved for leave to intervene and contest the adjudication, on the ground that the voluntary assignment which was alleged as the act of bankruptcy, was void, having been executed by only three of five partners, and in the firm name by one of the partners signing as attorney-in-fact for the firm; whereas it was alleged the partner so signing for the firm never held any power of attorney for that purpose. Held, that the motion must be denied; that the facts stated do not make a case of fraud or collusion to procure an adjudication, to which the petitioning creditors are not in fact entitled, and that the fact that the moving creditors have made levies on the property since the filing of the petition gives them no rights as against the petitioning creditors different from that of creditors at large. *In re Lawrence et al.*, 18 B. R. 516.

A petitioning creditor will not be allowed to withdraw where rights of his copetitioners will be injured thereby, though he has been induced to join in petition by a misrepresentation of one of the debtors, where same was not as to any matter of substance, nor intentionally false. *In re Vogel & Reynolds*, 18 B. R. 165.

Permission to withdraw will be withheld whenever the object and policy of the act would otherwise be defeated. *In re Sheffer*, 17 B. R. 369.

ACT OF 1867, § 5014. If any person residing within the jurisdiction of the United States, and owing debts provable in bankruptcy exceeding the amount of three hundred dollars, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain his discharge from his debts, and shall annex to his petition a schedule, and inventory<sup>1</sup> and valuation, in compliance with

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<sup>1</sup> So amended by act of June 22, 1874, ch. 390, § 15, 18 Stat. 182.

the next two sections, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt.

Statute revised — March 2, 1867, ch. 176, § 11, 14 Stat. 521. Prior Statute — Aug. 19, 1841, ch. 9, § 7, 5 Stat. 446.

**Who may File a Petition.**— Resident aliens may take the benefit of the act. This section makes every person residing within the jurisdiction of the United States, who owes a certain amount of debts, subject to the act, and it is not denied that resident aliens are here included. If confirmation were needed, it is found in the latter part of the section, which prescribes a special form of oath for citizens of the United States; clearly showing that some others than citizens are capable of becoming petitioners. *In re Goodfellow*, 3 B. R. 452; s. c. *Lowell*, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69.

A person who is a partner in a foreign firm may apply for the benefit of the bankruptcy law. *Cutter v. Folsom*, 17 N. H. 139.

The statute embraces not merely those who resided in the United States at the time when the bankruptcy law was passed, but such as at any subsequent period become resident in the United States. *Ibid*.

An infant may file a petition in his own name. *In re Samuel Book*, 3 McLean, 317; *in re Samuel S. Cotton*, 2 N. Y. Leg. Obs. 370.

If a person, while sane, has committed an act of bankruptcy, he may be made bankrupt after he has become lunatic. The rights of the bankrupt will be fully protected by his guardian. *In re D. Pratt*, 6 B. R. 276.

A feme covert who is a sole trader may apply for the benefit of the bankruptcy law. *In re Harriet E. Collins*, 10 B. R. 335; s. c. 3 Bliss. 415.

The making of a fraudulent conveyance does not prevent the debtor from filing a voluntary petition. *In re Chas. P. Houghton*, 4 Law Rep. 482.

**Petitions in Voluntary Bankruptcy.**— An illegible petition will not be allowed to be filed. *Anon.* 1 B. R. 215; s. c. 15 Pitts. L. J. 81.

A petition containing the required averments, and having a sworn schedule of debts and sworn inventory of property annexed to it, constitutes the petition required by the act. *In re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508.

The petition is sufficient although the jurat does not specify the particular day on which the oath was taken, if it gives the month and year. *In re Chas. P. Houghton*, 4 Law Rep. 482.

The petition need not be presented to the court simultaneously with its attestation. The lapse of nine days between the taking of the oath and the filing of the petition is no bar to the proceedings. *In re Aaron Abrahams*, 5 Law Rep. 328.

No provision is made by the bankruptcy act enabling parties to conduct proceedings *in forma pauperis*, and the act evidently contemplates that they shall discharge all expenses incident to the prosecution of their application. *In re Alexander Graves*, 1 N. Y. Leg. Obs. 213; s. c. 3 Law Rep. 25.

The petition and schedules are three papers. *In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.

The provisions of the act and the rules serve to show that the petition is filed once for all in any case; that if it is amended, such amendment does not alter the date of its filing, or postpone the effective vigor of such filing to the time the amendment to it is filed; or that any petition or schedule that is amended is merely amended, leaving the original that is amended to stand, so far as the question of jurisdiction or commencement of the proceedings is concerned, in regard to the time when it was filed, the same as if it were not amended. In *re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508.

The commencement of proceedings in bankruptcy on the part of the petitioner, is the commencement of a suit in the district court by the petitioner against his creditors, in which action the petitioner is plaintiff and the creditors defendants; the petitioner asking the court for a judgment against his creditors, the defendants, discharging him from his indebtedness to them. The defendants have their day in court, are entitled to be heard at all stages of the proceedings, and when the bankrupt files his application for a discharge from the payment of his debts, any single creditor may make opposition thereto, by entering his appearance and putting on file specifications against the discharge. Every defendant has the right to appear separately and put in a separate plea or answer. In *re Julius L. Adams*, 2 B. R. 272; s. c. 36 How. Pr. 270; s. c. 3 Ben. 7; in *re Farrell*, 5 B. R. 125.

While one petition is still pending, without any discharge or any discontinuance, a stay will be entered of all proceedings upon another petition subsequently filed, setting forth the same debts and the same creditors. In *re Wierlaski*, 4 B. R. 390; s. c. 4 Ben. 468.

When the discharge is refused, because the bankrupt did not apply within the prescribed time, the result in principle is the same as where the plaintiff in a suit at law is non proessed; he has the costs of the first proceedings to pay, but is allowed to commence again and to continue until he reaches a judgment upon the merits of his case. In *re Farrell*, 5 B. R. 125.

A voluntary bankrupt who has contracted new debts since the filing of his petition, may file a new petition in bankruptcy. In *re P. C. Drisko*, 13 B. R. 112; s. c. 14 B. R. 551.

The petition is conclusive evidence that the debtor is insolvent, and desires to take the benefit of the act, and perhaps the fact that he owes \$300 may be conclusively found by the adjudication; but upon a fact which goes to defeat the jurisdiction of the court over the supposed bankrupt, it can not be so. Such a fact as that may be shown by plea and proof in any court by a person not estopped to show it, and it can not be that the only exception is of the court in which the void proceedings themselves are pending, nor is the adjudication binding as a judicial decree which must be impeached, if at all, in a higher court. It is made ex parte without notice to creditors, and is entirely under the control of the court, upon proof that it ought to be annulled, at least before the first meeting of creditors. In *re Goodfellow*, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. R. 179; s. c. 3 L. T. R. 69.

If several persons, alleging themselves to be partners, file a voluntary



petition, the creditors can not compel them to amend it by joining other persons who are also alleged to be partners. In *re Harbaugh, Matthias & Co.*, 15 Pitts. L. J. 246; s. c. 24 Pitts. L. J. 100.

If several persons file a voluntary petition as partners, without joining others who are also partners, the court, on the motion of any creditor, can annul the adjudication at any time up to the first meeting of creditors, and perhaps at any time until the effects of the firm have become so fixed that the estate can not be put in statu quo. *Ibid.*

The bankrupt by filing his petition submits himself personally to the jurisdiction of the court, and he becomes bound to obey its orders and directions in the matter of his petition as well before as after an adjudication. The mere filing of his petition in conformity with the statute constitutes him a bankrupt, within the purview of the act, before the adjudication or any action on his petition by the court. This jurisdiction is exercised on the ground that other persons besides the bankrupt have an interest in the matter at this stage of the proceedings. In *re Samuel Harris*, 3 N. Y. Leg. Obs. 152.

A voluntary bankrupt can not withdraw his petition at his own pleasure, but must show good reason for doing so. In all cases, a party coming as a volunteer into court in a matter where others may have an interest must move for liberty to discontinue, and when other parties have acquired an interest in the proceedings, the court will either grant the liberty on terms or refuse it altogether as justice may require. The creditors have an interest in the proceedings from the moment that the petition is filed. *Ibid.*

The dismissal of the petition prior to an adjudication is in the nature of a supersedeas, and is ordinarily a matter of sound discretion in the court. In *re Randall & Reed*, 1 N. Y. Leg. Obs. 199; s. c. 5 Law Rep. 115.

A voluntary bankrupt may, for good reasons, be allowed to withdraw his petition at any time before adjudication. In *re Bennet*, 1 Penn. L. J. 145; in *re Randall & Reed*, 1 N. Y. Leg. Obs. 199; s. c. 5 Law Rep. 115; in *re Anon.*, 1 Penn. L. J. 323; in *re Dudley*, 1 Penn. L. J. 302; in *re John Gile*, 1 N. Y. Leg. Obs. 87; 5 Law Rep. 224.

If the debtor has made a compromise and composition of all his debts, the petition may be dismissed on payment of costs. In *re Randall & Reed*, 1 N. Y. Leg. Obs. 199; s. c. 5 Law Rep. 115.

If the debtor does not choose to proceed with his petition, but lets it remain in suspense, with his property locked up from his creditors, they may intervene for their own interest by a motion for an adjudication, or for any other matter necessary for the protection of their rights. In *re Samuel Harris*, 3 N. Y. Leg. Obs. 152.

If the assignee refuses to consent to a dismissal of the proceedings, the court, with the consent of the creditors, may order the adjudication to be vacated, and all further proceedings stayed, on notice to him to show cause against the motion. In *re John Gile*, 1 N. Y. Leg. Obs. 87; s. c. 5 Law Rep. 224.

After an adjudication, the petition can not be dismissed without the concurrence and consent of all the creditors. *Ibid.*

Formal pleading in opposition to a petition is not usual or necessary. Objection to the person of the petitioner may be made by a plea in abatement, but the plea will be treated merely as a written objection. In *re Samuel Book*, 3 McLean, 317.

The district court has power to hear and decide all contested questions, and to stay proceedings improvidently begun. The act contemplates that voluntary petitions may sometimes be contested, for it provides that the register may make adjudication if there be no opposing party. But it is not the intent of the act that the court shall inquire whether the petitioner is insolvent or not. When the debtor swears that he is unable to pay his debts in full, and files the requisite petition and schedules, he has committed an act of bankruptcy, and any creditor may then carry on the proceedings if the debtor shall fail to do so. His act is for the benefit of all persons interested, and can not be retracted on the application of only one of them, with or without the debtor's consent. No notice is required to creditors before adjudication, and the judge or register is only to inquire whether the debtor owes \$300. That he is unable to pay his debt in full, and is willing to surrender all his property is conclusively proved by his petition so far as a decree of bankruptcy is concerned. The only questions open upon a voluntary petition are those which go to the jurisdiction, such as residence, and a sum total of provable debts of \$300. In *re James L. Fowler*, 1 B. R. 681; *s. c.* Lowell, 161.

A creditor can not prevent an adjudication by proving that the debtor is able to pay his debts, and that the only object in filing the petition is to delay the collection of certain executions. *Ibid.*

A motion to set aside the adjudication on account of the absence of certain jurisdictional averments in the petition can not be entertained. The proper way to raise such a question as to the jurisdiction of the court is by specifications against the discharge of the bankrupt. In *re Penn et al.*, 3 B. R. 582; *s. c.* 4 Ben. 99.

**In what District Petitions must be Filed.**—The bankruptcy act uses the term "residence" specifically, as contradistinguished from "domicile," so as to free cases under it from the difficult and embarrassing presumptions and circumstances upon which the distinctions between "domicile" and "residence" rest. Congress, as if *ex industria* designing to escape that region of dispute, used a legal term, about which there is no difficulty, either as to its accurate meaning, or as to the facilities of proof connected with it. "Residence" is a fact easily ascertained; "domicile," a question difficult of proof. It is true that the two terms are often used as synonymous, but in law they have distinct meanings. Proceedings in bankruptcy should be instituted with reference to the actual residence of the party, or his place of business, and not with reference to his domicile. If a party has actually resided in one State during the greater part of the six months next immediately preceding the filing of the petition, the petition must be filed in the district court for that State, although his family may have resided in another State during the whole period. In *re Watson*, 4 B. R. 613.

The residence of the bankrupt is the place where his family reside, al-

though he may make a temporary sojourn in another state. *Stiles v. Lay*, 9 Ala. 795.

Residence denotes an actual domicile or inhabitancy, in contradistinction to a mere temporary abode in lodging. In *re Israel Kinsman*, 1 N. Y. Leg. Obs. 309.

Upon the hearing of a petition filed by a creditor to vacate the whole proceedings in bankruptcy, for want of jurisdiction, it was held that where a person leaves a foreign domicile, with the intention of returning to his native domicile, and does so return, his residence in his native domicile dates from the day on which he left the foreign domicile. In *re W. S. Walker*, 1 B. R. 386; s. c. *Lowell*, 237; s. c. 1 L. T. B. 38.

A corporation can have no residence out of a State by whose laws it was created, and therefore, in virtue of residence, no jurisdiction can be acquired by any district court outside of such State. In *re Ala. & Chat. R. R. Co.*, 6 B. R. 107; s. c. 9 Blatch. 391; s. c. 5 L. T. B. 76.

In a certain sense, the place of the most transient stoppage, a mere purchase, a bargain made by a man on his transit through a place would render it for the time being his place of business. Persons resorting to market towns to dispose of produce or make purchases would have, in a literal acceptance, their places of business there in conducting such transactions. It can not, however, satisfy this provision of the law to prove the fact that the bankrupt is doing some kind of business at the place where he makes his application, if his legal residence is in a different district. More must be shown. It must appear distinctly that he has a fixed and notorious employment, pursued by him in such manner as to denote a place of business established by him distinct from his place of residence. A fugitive or equivocal occupation that may continue for a long period or may terminate instantaneously, without any outward change or indications calculated to mark its continuance or character, will not be sufficient to satisfy this provision of the law. In *re Israel Kinsman*, 1 N. Y. Leg. Obs. 309.

An agent who is merely temporarily executing his agency in a district does not have a place of business in the district. *Ibid.*

In its broadest sense, the term "business" includes nearly all the affairs in which either an individual or a corporation can be actors. Indulgence in pleasure, participation in domestic enjoyment, and engagement in the offices of merely personal religion may be exceptions in the case of an individual, but the employment of means to secure or provide for these would, to him, be business, and to a corporation these exceptions can have no application. The conduct of any and all of the affairs of a corporation is business. The term, carrying on business, has not the same meaning as transacting any of the debtor's business. There are in the carrying on of a business many affairs which are merely incidental and which may, be, and often are, transacted elsewhere than at the place where the business—that which is the real design and purpose or object in view—is located, and such transactions may be of such frequent and even daily occurrence as to require an agency of considerable duration. Such transactions are not a carrying on of business in the sense of the law. "Carrying

on business" looks to the scheme and purpose to which such transactions tend, and not to the incidental transactions themselves. The debtor may find it necessary or expedient, in aid of his business, to employ agents or agencies in other places than those in which his business is carried on; but the transactions of such agents are only collateral or incidental. They do not, in a just sense, constitute the business of the debtor. It was not intended, by reason of such transactions, to subject the debtor to proceedings in bankruptcy where those agencies are maintained, whether these are conducted by agents under one name or another, either officers or clerks, or by whatever name or official relation designated. In *re Ala. & Chat. R. R. Co.*, 6 B. R. 107; s. c. 9 Blatch, 391; s. c. 5 L. T. B. 76.

A person who resides in one district, where he was formerly a member of a firm that has failed, and has an office in another district where he receives letters, and is engaged in winding up the business of the firm, does not carry on business, in the sense of the bankruptcy act, in the latter district, and can only apply in the district where he resides. In *re Little*, 2 B. R. 294; s. c. 3 Ben. 25.

A person who has been employed as a clerk for more than a year in one district, but has resided in another district, can not apply in the district where he has been employed, but must apply in the district where he has resided. It can hardly be said that a bookkeeper carries on business in a way that will give such publicity to his occupation or person as is contemplated by the act. In *re Wm. H. Magie*, 1 B. R. 522; s. c. 2 Ben. 369.

But where the petitioner is well known to be doing business as the agent of another party, he may apply in the district where he transacts his business. In *re Bailey*, 1 B. R. 613; s. c. 2 Ben. 437; in *re Belcher*, 1 B. R. 666; s. c. 2 Ben. 468.

The debtor may file his petition in the district in which he has resided or carried on business for the six months next immediately preceding the filing of the petition, or for the longest period during or within such six months that he has resided or carried on business in any district. The object of the provision is to bring within the operation of the act every debtor who has resided or carried on business in any district for any length of time, provided the proceedings are instituted in the district in which his residence or carrying on of business has continued so long as to cover the longest space of time that he has resided or carried on business in any district during the six months next immediately preceding the time of filing the petition. Thus, during or within such six months, the debtor may have resided or carried on business in one district for two months, in another for one month and three-quarters, in another for one month and one quarter, and in another for one month. In such case, the proper district in which to file the petition is the one in which the debtor has resided for two months. The fact that he has carried on business in another district for as long a period during the six months as he carried it on in the district in which he has filed his petition, does not deprive the court for the latter district of jurisdiction over the case, it not appearing that he carried on business in the former district for a longer period during the

six months than he carried it on in the latter. In *re Elisha Foster*, 3 B. R. 236; s. c. 3 Ben. 386; s. c. 1 L. T. B. 127; in *re Goodfellow*, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69.

When one partner proceeds against his copartner, an averment that the petitioner for the six months next preceding the application has been a resident of the judicial district in which the petition is filed, and that he and his copartner, within said time, were partners in trade in said district, is sufficient to sustain the jurisdiction of the court, if the proceedings are brought in question collaterally, when it does not appear that the firm did business for a longer period in any other district. *Stuart v. Hines*, 6 B. R. 416; s. c. 33 Iowa, 60; s. c. 5 L. T. B. 46.

The statute provides, in the alternative, that the debtor may be declared bankrupt either in the district in which he resides or carries on business. When once proceedings have been commenced in either district, it is a necessary consequence that the like proceedings can not be had in the other, and the jurisdiction is exclusive in that court where the jurisdiction first attaches. In *re Horace Hall*, 5 Law Rep. 269.

**Adjudication.**—The adjudication of bankruptcy ought not to be postponed until the register has examined the petition and schedules, and certified them to be correct. In *re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508.

The adjudication of bankruptcy is merely a certificate or order made by an authorized officer, to the effect that the debtor has become a bankrupt. It is nothing but a judicial finding of the fact that an act of bankruptcy was committed at some period prior to the time the adjudication is made. *Ibid.*

The register is to declare the party a bankrupt, but has no authority to ascertain the day of his becoming so. If he names the day, it is competent for a party in a collateral action to controvert the act of the register, so far as it respects the fixing of the day when the bankrupt becomes such, and to say that it was not till long afterward. *Rathbone v. Blackford*, 1 Caines, 588.

An adjudication which recites the act of March 2, 1867, as authority for the proceeding, is neither irregular nor void. *Ballin v. Ferst*, 55 Ga. 546.

**ACT OF 1898, CH. 3, § 7. Schedules and Petitions.**—(8). See *post*, p. 314. For practice in voluntary bankruptcy, see corresponding provisions governing involuntary bankruptcy.

**ACT OF 1867, § 5015.** The said schedule must contain a full and true statement of all his debts, exhibiting, as far as possible, to whom each debt is due, the place of residence of each creditor, if known to the debtor, and if not known, the fact that it is not known; also the sum due to each creditor; the nature of each debt or demand, whether founded on written security, obligation, or contract, or otherwise; the true cause and consideration of the indebtedness in each case, and the place where such indebtedness accrued; and also a

statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same.

Statute revised — March 2, 1867, ch. 176, § 11, 14 Stat. 521. Prior Statute — August 19, 1841, ch. 9, § 1, 5 Stat. 440.

Petitions in bankruptcy must be full and be true in point of fact, otherwise no discharge will be granted. *In re Redfield*, 2 Ben. 72.

The inability to pay debts, mentioned in this section, is the same thing as the insolvency mentioned in section 5021. It means the inability of the debtor, then and there, to pay accruing debts as they mature in the ordinary way, in the usual course of business or trade, in that which is made by the law of the United States a lawful tender in the payment of debts. *Hardy v. Clark*, 3 B. R. 385; s. c. 1 L. T. B. 151; s. c. 3 L. T. B. 11; s. c. 17 Pitts. L. J. 61; s. c. 2 C. L. N. 121.

The name of a creditor who has a lien on the land of the petitioner should be placed on schedule A, No. 2. *In re Decatur Jones*, 2 B. R. 59.

Wherever the sum and the date of the debt are given, the statement is sufficient. *In re W. D. Hill*, 1 B. R. 16; s. c. 1 Ben. 321.

Where the petitioner owes a debt to a newspaper he should give the names of the proprietors. *Anon.*, 2 B. R. 141.

Where the petitioner owes a debt to a firm, it is safest to return the partnership debt as due to the firm, without naming the partners. *Anon.*, 1 B. R. 123.

If the petitioner, as administrator, has spent the funds belonging to the estate, it is sufficient to state the debts as due to the estate, and not to the creditors of that estate, although a dividend has been declared. *In re John C. Tebbets*, 5 Law Rep. 259.

The abode and the post-office address should be both stated, so that personal service may be ordered at the former, or service by mail at the latter. *In re J. Pulver*, 1 B. R. 46; s. c. 1 Ben. 381.

In view of this section of the act, and of Form No. 1, and of Rule XXXIII, wherever a debtor states that the residence of a creditor is not known, he should show in the schedule, or in a separate affidavit, what efforts he has made to ascertain the present residence of the creditor. The debtor must make efforts to ascertain the present residence of his creditors; and he can not satisfy the law by reposing on the information at hand, and the belief which he may possess, without making any efforts to ascertain such present residences. *Ibid.*

It is necessary to state in the schedules whether or not any note has been given or judgment rendered, and whether any person is liable with the debtor as partner or joint contractor. *In re Orne*, 1 B. R. 79; s. c. 1 Ben. 429.

Debts barred by the statute of limitations should be placed on the schedules. *In re John S. Perry*, 1 B. R. 220; s. c. 1 L. T. B. 4.

The placing of a debt barred by the statute of limitations upon the schedules will not revive the debt. *In re Ray*, 1 B. R. 203; s. c. 2 Ben. 253; *in re Paul P. Kingsley*, 1 B. R. 329; s. c. Lowell, 216; *in re Harden*,

1 B. R. 395; s. c. 1 L. T. B. 48; in re John S. Wright, 6 Biss. 317. Contra, *Horner v. Speed*, 2 Pat. & H. 616.

Absolute accuracy is not required, for it is to be done as far as practicable. The provisions of this section show that all the creditors, so far as known, are to be made parties by actual notice, and the publication is clearly intended to those not known or whose residence is not known. *Hudson v. Bingham*, 8 B. R. 494; s. c. 6 L. T. B. 326; s. c. 12 A. L. Reg. 637.

§ 5016. The said inventory must contain an accurate statement of all the petitioner's estate, both real and personal, assignable under this Title, describing the same and stating where it is situated, and whether there are any, and if so, what incumbrances thereon.

Statute revised — March 22, 1867, ch. 176, § 11, 14 Stat. 521. Prior Statute — Aug. 10, 1841, ch. 9, § 1, 5 Stat. 440.

The schedules must set forth the separate items of the petitioner's estate. In re W. D. Hill, 1 B. R. 16; s. c. 1 Ben. 321. Vide in re Robert Malcolm, 4 Law Rep. 488.

It is not necessary that the petitioner shall set forth a perfect and complete exhibit of every article; but the schedule must be so explicit that the assignee may be enabled to find the property, if necessary. It is not necessary that every article of clothing shall be set out. The wearing apparel should be so set forth that the assignee may be enabled to ascertain whether he can claim it or not. In re Robert Malcolm, 4 Law Rep. 488; in re Horace Plimpton, 4 Law Rep. 488.

Property conveyed by the petitioner in trust, for the benefit of his creditors, must be set forth, as far as possible, under one of the heads of schedule B. In re Pierce & Holbrook, 3 B. R. 258; s. c. 16 Pitts. L. J. 204.

Judgments in favor of the petitioner should be set forth in schedule B, No. 2 b. In re Sallee, 2 B. R. 228.

The statute, though framed in the most comprehensive terms, has reference to some right or interest inherent in the bankrupt. Whatever that may be, however contingent or valueless, he must name it, and point it out to his creditors. He is not permitted to exercise his own judgment as to its worth to them. In re David H. Robertson, 1 N. Y. Leg. Obs. 20.

The petitioner should state the proportion of his interest in the property of a firm of which he is a member, but need not enumerate the effects in detail. In re Nicholas G. Norcross, 1 N. Y. Leg. Obs. 100; s. c. 5 Law Rep. 124.

The petitioner is not restricted to the letters printed on the schedule. He may exhaust the alphabet, and use other marks, if he can thereby set forth his property more lucidly. In re Sallee, 2 B. R. 228.

The petitioner is only required to use such of the forms as are appropriate to and descriptive of the debts and property he is required to list. It would be absurd to require him to file in addition thereto a large mass of forms, all of which are simply blanks. He should state, however, the reason why these were omitted. *Anon.*, 1 B. R. 123.

(The practice in this particular is generally regulated by the rules of court for each district. *Blatchford's Rules*, No. 4 — Ed.)

The term assets has been held to include the following things, to-wit:  
A claim for unliquidated damages. In re Orne, 1 B. R. 57; s. c. 1 Ben. 361.

Property conveyed to the petitioner in fraud of the creditors of the grantor. In re O'Bannon, 2 B. R. 15.

A vested interest expectant on the termination of a life estate. In re Bennett, 2 B. R. 181; s. c. 8 A. L. Reg. 34; s. c. 25 Pitts. L. J. 316.

An insurance on the petitioner's life, for the benefit of the petitioner's wife, whereon premiums have been paid by the petitioner after his insolvency. In re Erben, 2 B. R. 181; s. c. 8 A. L. Reg. 34.

Property in the possession of the petitioner, which belongs to a firm of which he has been a member. In re Beal, 2 B. R. 587; s. c. Lowell, 323; s. c. 2 L. T. B. 95.

The interest of the petitioner in the rights of action, and credits of a firm of which he was a member, although his interest in the firm has been levied upon and sold. Moore v. Rosenberger, 7 Phila. 576.

Property conveyed by the petitioner in fraud of his creditors. In re Hussmann, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 C. L. N. 177.

Property in the possession of the petitioner covered by a fraudulent assignment to which the creditors have never assented. Ashley v. Robinson, 20 Ala. 112.

Property held de facto, though by a defeasible title. In re Beal, 2 B. R. 587; s. c. Lowell, 323; s. c. 2 L. T. B. 95.

The money advanced by the petitioner as security for fees to the register, the clerk, and the marshal. Anon., 1 B. R. 123.

The husband's share in property left to him in trust, for the sole and separate use of his wife, during her life, and after her death to be equally divided between the husband and her children, share and share alike, even though there is a provision in the will that the property shall not be liable to the payment of the debts of any present or future husband. This latter provision must be construed to be limited by and to apply only during the life of the wife. In re Myrick, 3 B. R. 154.

The interest of the bankrupt under a will in an estate in expectancy. In re Connell, Jr., 3 B. R. 443.

The term assets has been held not to include the following things, to-wit:

The right to a share in the net profits of a business conducted in the name of the petitioner, allowed as a compensation for services. In re Beardsley, 1 B. R. 304; in re Wm. H. Pierson, 10 B. R. 107; in re George Brown, 5 Law Rep. 121.

Property held by a trustee for the benefit of the petitioner's wife, wherein the petitioner's equitable interest had been sold under execution. In re Pomeroy, 2 B. R. 14; in re Hummitsh, 2 B. R. 12; s. c. 15 Pitts. L. J. 494.

Money invested in the name of the petitioner's wife, which has been earned by her. In re Hummitsh, 2 B. R. 12; s. c. 15 Pitts. L. J. 494.

A claim against a person for falsely recommending another as worthy of trust. Crockett v. Jewett, 2 B. R. 208; s. c. 2 Ben. 514; s. c. 2 L. T. B. 21.



Property which, at the time of the filing of the petition, is vested in a receiver appointed by a State court. *In re Freeman*, 4 B. R. 64; s. c. 4 Ben. 245.

A chose in action on which suit has been brought, but which has been assigned in good faith for a full and valuable consideration. *Valentine v. Holloman*, 63 N. C. 475.

An assignment made under the State insolvent laws, when they were in force, was the act of the law, and not of the party; and the confirmatory instruments which the debtor might be required by the assignee and ordered by the judge to execute were equally made by legal authority and direction. Property included in such an assignment, made before the commencement of proceedings in bankruptcy, no longer belongs to the debtor, and constitutes no part of the assets of the bankrupt. *Day v. Bardwell*, 3 B. R. 455; s. c. 97 Mass. 240.

Act of 1867, § 5017. The schedule and inventory must be verified by the oath of the petitioner, which may be taken either before the district judge, or before a register, or before a commissioner of the circuit court.

Statute revised — March 2, 1867, ch. 176, § 11, 14 Stat. 521. Prior Statute — Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440.

A petition in involuntary bankruptcy can not be verified before a notary public. *In re Heller Bros. & Co.*, 32 Leg. Int. 136; s. c. 22 Pitts. L. J. 140.

An indictment for perjury need not set out the petition substantially or otherwise. A mere reference to its character and object is sufficient. *U. S. v. Deming*, 4 McLean, 3; *U. S. v. Nikols*, 4 McLean, 23.

An indictment for perjury, which describes the petition as made to "a judge sitting as a bankruptcy court," is sufficient, for no judge can sit in bankruptcy except the district judge. *U. S. v. Deming*, 4 McLean, 3.

Acts of 1867 and 1874, § 5018. Every citizen of the United States petitioning to be declared bankrupt, shall, on filing his petition, and before any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath may be taken before either of the officers mentioned in the preceding section, and shall be filed and recorded with the proceedings in bankruptcy.

Statute revised — March 2, 1867, ch. 176, § 11, 14 Stat. 521.

Although the prescribed form contemplates that the oath of allegiance shall be annexed to the petition, yet it can not be doubted that, by the very terms of the statute, it may be lawfully filed at any time afterward, and

with precisely the same effect as if annexed. *U. S. v. Clark*, 4 B. R. 59; s. c. 1 L. T. B. 237; s. c. 3 L. T. B. 223; in re *A. J. Walker*, 1 B. R. 335.

ACT OF 1867, § 5019. Upon the filing of such petition, schedule, and inventory, the judge or register shall forthwith, if he is satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the marshal for the district, authorizing him forthwith, as messenger, to publish notices in such newspapers<sup>1</sup> as the marshal shall select, not exceeding two; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor; and to give such personal or other notice to any persons concerned as the warrant specifies;<sup>1</sup> but whenever the creditors of the bankrupt are so numerous as to make any notice now required by law to them, by mail or otherwise, a great and disproportionate expense to the estate, the court may, in lieu thereof, in its discretion, order such notice to be given by publication in a newspaper, or newspapers, to all such creditors, whose claims, as reported, do not exceed the sums, respectively, of fifty dollars.

Statute revised — March 2, 1867, ch. 176, § 11, 14 Stat. 521. Prior Statute — Aug. 19, 1841, ch. 9, § 7, 5 Stat. 446.

The proceedings in bankruptcy are in no just sense *ex parte* in their character, for notice is required to be given to the creditors either personally or by publication. *Lathrop v. Stuart*, 5 McLean, 167.

After the public notice required by the statute has been given, creditors must be treated as having notice of the proceedings. *Smith v. Brinckerhoff*, 6 N. Y. 305; s. c. 8 Barb. 519. Contra, *Miller v. Black*, 1 Penn. 420.

The warrant should contain a list of the bankrupt's creditors, with their respective places of residence, and the amount of their respective debts. In re *Erie L. Hall*, 2 B. R. 192; s. c. 16 Pitts. L. J. 52.

The omission to publish the notice in one of the newspapers designated by the warrant, is such a defect as will make all proceedings founded thereon, and subsequent thereto, irregular and voidable. *Ibid*.

The marshal should insert in the notices served on the creditors the exact language of the warrant, but an immaterial variance will be disregarded. In re *J. Pulver*, 1 B. R. 46; s. c. 1 Ben. 381; in re *W. D. Hill*, 1 B. R. 16; s. c. 1 Ben. 321.

The notice to be served on the bankrupt's creditors should contain a list of all the creditors, with their respective places of residence, and the

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<sup>1</sup> So amended by act of June 22, 1874, ch. 390, § 5, 18 Stat. 179.

amount due to each. In re Decatur Jones, 2 B. R. 59; in re John S. Perry, 1 B. R. 220; s. c. 1 L. T. B. 4; in re Erie L. Hall, 2 B. R. 192; s. c. 16 Pitts. L. J. 52.

The marshal should insert in the notice to be published and served, the exact language of the warrant, but an immaterial variance will be disregarded. In re J. Pulver, 1 B. R. 46; s. c. 1 Ben. 381.

The marshal has no discretion, but must serve all notices by mail, unless directed by the warrant to serve the notices personally on the parties therein specified by name. Anon., 1 B. R. 216.

The notice must be served on foreign creditors, as well as those who reside in the United States. In re Heyes, 1 B. R. 21; s. c. 1 Ben. 333; s. c. 36 How. Pr. 249.

ACT OF 1867, § 5020. Every bankrupt shall be at liberty, from time<sup>1</sup> to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts.

Statute revised — March 2, 1867, ch. 176, § 26, 14 Stat. 529.

For the purpose of allowing amendments where they are uncontested, the register is the court, and has the power to allow them on a direct application to him. The co-ordinate power of allowing them exists in the judge. The original amendments permitted to be made should be filed with the clerk. In re Morford, 1 B. R. 211; s. c. 1 Ben. 264; in re B. Heller, 5 B. R. 46; s. c. 41 How. Pr. 213.

The register can, of his own motion, order amendments at any stage of the proceedings. Such an order ought to specify particularly the points in which the petition and schedules are defective. In re Orne, 1 B. R. 79; s. c. 1 Ben. 420; in re Horace Plimpton, 4 Law Rep. 488.

The register may order an amendment upon the petition of a creditor. In re Decatur Jones, 2 B. R. 59.

The register may refuse to allow amendments, except upon such conditions as will prevent injustice. In re Ratcliff, 1 B. R. 400; in re Perry, 1 B. R. 220; s. c. 1 L. T. B. 4.

The bankrupt may make an application for leave to amend his schedules at any stage of the proceedings before the register has returned the cause to the court, and the filing of specifications does not prejudice him in or deprive him of the right. In re B. Heller, 5 B. R. 46; s. c. 41 How. Pr. 213; in re Chas. Oakley, 5 Law Rep. 327.

When it appears, on the hearing of the specifications against the discharge of the bankrupt, that he has innocently omitted some property from his schedules, the case will be referred back to the register with leave to the bankrupt to amend his schedules. In re Connell, 3 B. R. 443; in re A. B. Preston, 3 B. R. 103.

The application for leave to amend is *ex parte*, and no notice is necessary. No creditor has a right to oppose the application. The allowance

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<sup>1</sup> So amended by act of Feb. 27, 1877, ch. 69, 19 Stat. 252.

of an amendment does not prejudice the rights of a creditor. He is not a party to the proceeding, and is not estopped by the order. In re Watts, 2 B. R. 447; s. c. 3 Ben. 166; s. c. 2 L. T. B. 74; in re B. Heller, 5 B. R. 46; s. c. 41 How. Pr. 213.

The better practice in order to bring the question fully before the court, is to allow the assignee and creditors opposing the discharge to oppose the application for leave to amend, and to require due notice of such application to be given to them. In re B. Heller, 5 B. R. 46; s. c. 41 How. Pr. 213.

The bankrupt has the right to amend his schedules by striking out the names of persons who have been improperly and inadvertently inserted as creditors. Ibid.

The bankrupt may amend his petition so as to bring in his copartner. In re Little, 1 B. R. 341; s. c. 2 Ben. 186.

If the petition merely alleges, that the bankrupt had a place of business within the district, he may be allowed to amend upon showing why the petition was not originally made in proper form, and accounting for the delay in applying for leave to amend. In re Edward T. Wood, 13 B. R. 96; s. c. 6 Ben. 339.

## TITLE VIII.

### INVOLUNTARY BANKRUPTCY.

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ACT OF 1898, CH. 1, § 1. **Definitions.**—(4) “Bankrupt” shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (2) “adjudication” shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (12) “discharge” shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act; (15) a person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (19) “persons” shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) “petition” shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (27) “wage-earner” shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year.

ACT OF 1898, CH. 3, § 4. **Who May Become Bankrupts.**—

(a) Any person who owes debts except a corporation shall be entitled to the benefits of this Act as a voluntary bankrupt.

(b) Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated

company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.

The pendency of a petition to set aside a composition in an involuntary proceeding, no adjudication having been made therein, was no bar to the right of voluntary petition secured by the act to the debtor. Proceedings should be continued in the case in which an adjudication was made, and proceedings in the involuntary case should be stayed. *In re Flannagan*, 18 B. R. 439.

Under the bankruptcy law of 1867, the court had no power in involuntary proceedings to adjudicate any person a bankrupt who was not a citizen of the United States at time of filing of petition, though such person may have carried on business within the district for the requisite period. *In re Burton & Watson*, 17 B. R. 212.

Assignee of a corporation appointed under the bankruptcy laws represents both the corporation and its creditors, and the defense of irregular organization can not be urged against him. *Chubb v. Upton*, 16 B. R. 537.

ACT OF 1898, CH. 3, § 5. **Partners.**—(a) A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

(b) The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

(c) The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

(d) The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

(e) The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

(f) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of

any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

(g) The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

(h) In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

ACT OF 1898, CH. 3, § 3. **Acts of Bankruptcy.**—(a) Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

(b) A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if

by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

(c) It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

(d) Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

(e) Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

Paying individual debt with partnership property, though each partner liable for such debt, is an act of bankruptcy. *In re E. L. Matot & Co.*, 16 B. R. 485.



On the 11th January, 1878, the bankrupt, a druggist, executed a chattel mortgage on all his stock of drugs, etc., constituting his stock in trade, to his father-in-law, to secure him as surety on a note given by the bankrupt. The mortgage was taken with the understanding that the bankrupt was to go on and sell at retail in the ordinary way, which he accordingly did. On the 20th of May the mortgagee, having become dissatisfied with the way in which the business was being conducted, took possession of the property under the mortgage. On the 4th of June the petition in this case was filed. Held, that the mortgage and the seizure of the property thereunder were both acts of bankruptcy, the first as being a fraudulent conveyance, and the second as operating as an unlawful preference. *In re Foster*, 18 B. R. 64.

Carrying a message by a member of insolvent firm, at request of creditor, to attorney, directing entry of judgment, held a procuring of such judgment. *In re Benton*, 16 B. R. 65.

A voluntary general assignment is an act of bankruptcy of itself. *In re Croft Bros.*, 17 B. R. 324.

Defective execution of a voluntary assignment for the benefit of creditors does not prevent its being an act of bankruptcy. *In re Lawrence*, 18 B. R. 516.

Where a voluntary assignment made in good faith for benefit of creditors is set aside by subsequent proceedings in bankruptcy, the assignee will be allowed the necessary expenses of administering the estate while in his hands, but no compensation for his own services unless the court can see clearly that the estate will not be subjected to a duplication of charges. *In re Kurth*, 17 B. R. 573.

A general assignment without giving priority is superseded by proceedings in bankruptcy. *Dolson v. Kerr*, 16 B. R. 405.

Delivery of schedules not necessary to validity of an assignment for benefit of creditors. *In re Kimball et al.*, 16 B. R. 188.

None of the following facts rendered a deed of assignment void as to any other person than the assignee in bankruptcy, viz.: First, that it was made to a trustee, who was the clerk of the bankrupt; second, that it was made to a trustee of little or no property, but of excellent character, without requiring bond; third, that it required a sale of the goods for cash, but permitted a sale on credit of not exceeding thirty days, if trustee deemed this best; and, fourth, a subsequent proposition of the bankrupt to pay a certain amount to his creditors, coupled with a threat of bankruptcy. *In re Walker*, 18 B. R. 56.

#### ACT OF 1898, CH. 7, \* \* \* § 69. Possession of Property.—

(a) A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to de-

teriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

ACT OF 1867, § 5021.<sup>1</sup> That any person residing, and owing (a) debts, as aforesaid, who, after the passage of this act, shall depart from the State, District, or Territory of which he is an inhabitant, with intent to defraud his creditors; or, being absent, shall, with such intent, remain absent; or shall conceal (b) himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this act; or shall conceal (c) or remove any of his property to avoid its being attached, taken or sequestered on legal process; or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent (d) to delay, defraud or hinder his creditors; or who has been arrested (e) and held in custody under or by virtue of mesne process or execution, issued out of any court of the United States, or of any State, District, or Territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under this act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of the United States, or of such State, District, or Territory, applicable thereto, for a period of twenty days; or has been actually imprisoned for more than twenty days in a civil action founded on contract for the sum of one hundred dollars or upward; or who, being bankrupt or insolvent, (f) or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate rights, or credits, or confess judgment, or give any warrant to confess judgment, or procure his property to be taken on legal process.

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<sup>1</sup> So amended by act of June 22, 1874, ch. 390, § 12, 18 Stat. 180.

with intent to give a preference (g) to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat (h) or delay the operation of this act; or who, being a bank, banker, broker, merchant, trader, (j) manufacturer, or miner, has fraudulently stopped payment, or who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has stopped, or suspended and not resumed payment, within a period of forty days, of his commercial paper (made or passed in the course of his business as such), or who, being a bank or banker, shall fail for forty days to pay any depositor upon demand of payment lawfully made, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition (k) of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts (l) provable under this act amounts to at least one-third of the debts so provable: *Provided*, That such petition is brought within six months after such act of bankruptcy shall have been committed:<sup>1</sup> *Provided also*, That no voluntary assignment by a debtor or debtors of all his or their property, heretofore or hereafter made in good faith for the benefit of all his or their creditors, ratably and without creating any preference, and valid according to the law of the State where made, shall of itself, in the event of his or their being subsequently adjudicated bankrupts in a proceeding of involuntary bankruptcy, be a bar to the discharge of such debtor or debtors. And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter. And in all cases commenced since the first day of December, eighteen hundred and seventy-three, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that

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<sup>1</sup> So amended by act of July 26, 1878, ch. 234, § 1, 19 Stat. 102.

the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court (if satisfied that the admission was made in good faith), shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding in cases heretofore commenced, twenty days, and, in cases hereafter commenced, ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and, in cases hereafter commenced, with costs. And if such person shall be adjudged a bankrupt, the assignee may recover back the money (m) or property so paid, conveyed, sold, assigned, or transferred contrary to this act: *Provided*, That the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy. And the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers thereof, if so many there be. And if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers. And in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned. But if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purpose aforesaid.

Statutes revised — March 2, 1867, ch. 176, § 39, 14 Stat. 536; July 27, 1868, ch. 258, § 2, 15 Stat. 228. Prior Statutes — April 4, 1800, ch. 19, §§ 1, 2, 2 Stat. 19, 21; Aug. 19, 1841, ch. 9, § 7, 5 Stat. 446.

**Principles of Construction.**— This section is highly remedial, and should be liberally construed. It is not to be construed strictly, as if it were an obscure or special penal enactment. The act establishes a system, and regulates in all their details the relative rights and duties of debtor and creditor. It does not attempt to punish the bankrupt, but to distribute his property fairly and impartially among his creditors to whom in justice it belongs. It is remedial, and seeks to protect the honest creditor from being overreached and defrauded by the unscrupulous. It is intended to relieve the honest but unfortunate debtor from the burden of liabilities which he can not discharge, and allow him to commence the business of life anew. Such an act must be construed according to the fair import of its terms, with a view to effect its objects and to promote justice. In *re Locke*, 2 B. R. 382; s. c. *Lowell*, 293; in *re Muller & Brentano*, 3 B. R. 329; s. c. 1 *Deady*, 513; s. c. 2 L. T. B. 33; in *re Silverman*, 4 B. R. 523; s. c. 2 *Abb. C. C.* 243; s. c. 1 *Saw.* 410; in *re Wm. Eeles*, 1 N. Y. Leg. Obs. 84; s. c. 5 *Law Rep.* 273.

Its scope and purpose are to oblige insolvent traders to take the benefit of the bankruptcy act, and thus to insure an equal distribution of their estate under its carefully framed provisions. In *re Dibblee et al.*, 2 B. R. 617; s. c. 3 *Ben.* 283; in *re Locke*, 2 B. R. 382; s. c. *Lowell*, 293; *White v. Raftery*, 3 B. R. 221; s. c. 1 *O. L. N.* 361; s. c. 16 *Pitts. L. J.* 110.

That part of the statute which enumerates the acts of bankruptcy is in the nature of a penal statute, and to be construed strictly. It can not be enlarged by construction to include acts that are within the reason of the law, or the mischiefs intended to be provided against, but which are not within the words of the statute according to their reasonable construction. *Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131.

Sections 5128 and 5021 are very nearly related to each other in their provisions, and must be construed together in *pari materia*. Section 5128, in express language, applies equally to voluntary and involuntary cases. Therefore all the qualifications and conditions prescribed by section 5128, not inconsistent with the provisions of section 5021, will apply to proceedings under the latter section, and all the qualifications, conditions, and prohibitions of section 5021, so far as they relate to the same class of matters provided for by section 5128, and are not inconsistent with its provisions, will apply to proceedings under section 5128. In *re Tonkin & Trewartha*, 4 B. R. 52; s. c. 1 L. T. B. 232; s. c. 3 L. T. B. 221; in *re Black & Secor*, 1 B. R. 353; s. c. 2 *Ben.* 196; s. c. 1 L. T. B. 39; *Wadsworth v. Tyler*, 2 B. R. 316; s. c. 2 L. T. B. 28.

Section 5128 does not relate to or affect the question, what is an act of bankruptcy? By section 5021 alone that question must be answered. It is quite clear that facts which are entirely sufficient for adjudicating a debtor bankrupt on petition of his creditor, may be, and generally are, wholly insufficient to justify a decree declaring void a transfer of property, or preference given to a creditor. In *re Nickodemus*, 3 B. R. 230; s. c. 1 L. T. B. 140; s. c. 2 *O. L. N.* 49; s. c. 16 *Pitts. L. J.* 233; in *re Price Fuller*, 4 B. R. 115; s. c. 1 *Saw.* 243.

Section 5130 throws light upon the intention of Congress in the enactment of the 5021st section, and shows that any assignment or transfer of property by a failing debtor, not in the usual and ordinary course of business, is not only void, but evidence of fraud. *Perry v. Longley*, 1 B. R. 550; s. c. 1 L. T. B. 34; s. c. 7 A. L. Reg. 429; in re *Dean & Garrett*, 2 B. R. 89; *Davis & Green v. Armstrong*, 3 B. R. 34; s. c. 2 L. T. B. 138.

The act makes a discrimination between cases of voluntary and involuntary bankruptcy. The debtor upon filing a petition with the proper averments is declared a bankrupt by the court. The allegation can not be traversed, nor is any issue or inquiry as to its truth permitted. While the debtor may, on this broad basis, call on the court to administer his estate, the creditor who desires to do the same thing is limited to a few facts or circumstances, the existence of which is essential to his right to appeal to the court. When any one of these facts is set forth in a petition to the court by the creditor, the truth of the allegation may be denied by the debtor, and on the issue thus found, he may demand the verdict of a jury. The reason for the wide difference in the proceedings in the two cases is obvious. When a man is himself willing to refer his embarrassed condition to the proper court, with a full surrender of all his property, no harm can come to any one but himself, and there can be no solid objection to the course he pursues; but when a person claims to take from another all control of his property, to arrest him in the exercise of his occupation, and to impair his standing as a business man — in short, to place him in a position which may ruin him in the midst of a prosperous career, the precise circumstances or facts on which he is authorized to do this, should not only be well defined in the law, but clearly established in the court. *Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 489; *Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131.

**What Sum a Debtor Must Owe.**—(a) The language, "owing debts as aforesaid," has reference to the following words of section 5014, viz.: "owing debts provable in bankruptcy exceeding the amount of three hundred dollars." From this the following conclusions must be deduced:

1. The foundation of voluntary proceeding is indebtedness due and payable under the act against the debtor.

2. Whatever debts may be proved in a voluntary, may be proved in an involuntary case.

3. Whenever an indorser's liability has become fixed, such liability constitutes a debt, due and payable from the indorser, which may be made the foundation of involuntary as well as voluntary proceedings in bankruptcy.

Of course there must be shown in an involuntary case, in addition to such indebtedness, at least one of the acts of bankruptcy enumerated in this section. In re *Nickodemus*, 3 B. R. 230; s. c. 1 L. T. B. 140; s. c. 2 C. L. N. 49; s. c. 16 Pitts. L. J. 233.

A petition may be filed against a firm, although one of the partners has been previously declared a bankrupt on a petition filed against him alone. *Hunt v. Pooke*, 5 B. R. 161.

Persons who have been adjudged bankrupts as partners in one firm, may be subsequently declared bankrupts as partners with another in another firm. In re S. A. Jewett, 15 B. R. 126; s. c. 16 B. R. 48; s. c. 9 C. L. N. 345.

A certificate that the special partner has contributed a certain sum in cash and a certain sum in goods does not comply with the statutes of New York relating to limited partnerships, and the parties may be proceeded against in bankruptcy as general partners. In re William G. Merrill, 13 B. R. 91; s. c. 12 Blatch. 221.

A firm can not be adjudged bankrupt on an involuntary petition, unless all the partners are parties to the proceeding. In re Chas. S. Pitt, 14 B. R. 59.

A consolidated railroad corporation, existing under charters from several States, but having one name, one set of stockholders and officers, the same assets, and the same creditors, if thrown into bankruptcy in one of these States, can not be afterward adjudicated a bankrupt upon another petition by another creditor, brought in another State and district. The court first acquiring jurisdiction ought to retain it exclusively so far as an adjudication is concerned, and the assignment under the first adjudication will carry all corporate assets in the hands of the assignee. In re Boston, Hartford & Erie R. R. Co., 6 B. R. 209; s. c. 9 Blatch. 101.

Infants, as subjects of either voluntary or involuntary bankruptcy, are not in respect to their general contracts within the provisions of the bankruptcy law. In re Walter S. Derby, 8 B. R. 106; s. c. 6 Ben. 232.

A party who is under guardianship as a lunatic may be proceeded against in involuntary bankruptcy in opposition to the wish of his guardian. In re Weitzel, 14 B. R. 466; s. c. 3 Cent. L. J. 557.

The fact that a receiver has been appointed by a State court to take charge of the assets of a corporation in a proceeding under a State law relating to the distribution of the assets of insolvent corporations, is no ground for refusing to adjudicate such corporation bankrupt. In re Green Pond R. R. Co., 13 B. R. 118, in re National Life Ins. Co., 6 Bliss. 35.

The decree of a State court dissolving a corporation on account of a forfeiture of its charter does not prevent proceedings against it in bankruptcy. A corporation, however it may be dissolved, still exists for the purpose of paying its debts and of dividing its surplus, if any, among its shareholders, or of having this done by a court of equity acting on its property. A petition in bankruptcy is an equitable sequestration. In re Independent Ins. Co., 6 B. R. 169; s. c. 6 B. R. 260; s. c. 1 Holmes. 103; Thornhill v. Pank, 5 B. R. 377; s. c. 3 B. R. 435; s. c. 1 L. T. B. 287; s. c. 3 L. T. B. 38; s. c. 2 C. L. N. 157; in re Merchants' Ins. Co., 6 B. R. 43; s. c. 3 Bliss. 162; s. c. 2 L. T. B. 243; in re Washington Marine Ins. Co., 2 B. R. 648; s. c. 2 Ben. 202.

The bankruptcy law does not in general embrace trustees as executors, administrators, guardians, and others acting strictly in a fiduciary capacity. Graves v. Winter, 9 B. R. 357; s. c. 7 Pac. L. R. 165.

The executor of a banker who is merely authorized by the will to continue the business so long as may be necessary to a fair liquidation and

settlement thereof, and has no power that does not tend to the object, can not be declared a bankrupt as such. *Ibid.*

A feme covert who is authorized by the laws of the State to carry on business as a sole trader, and incur liabilities, may be declared a bankrupt. *In re Kinkead*, 7 B. R. 439; s. c. 3 Biss. 405; *In re O'Brien*, 1 B. R. 176; *In re Julia Lyons*, 2 Saw. 524; s. c. 1 A. L. T. (N. S.) 167.

A court of bankruptcy is clothed with all the powers of a court of equity, and if a feme covert, with the consent of her husband, can enter into copartnership with him or any other person, then she may be declared a bankrupt on the petition of creditors, or, at least, the firm, as a business entity, may be so adjudged for the purpose of distributing the assets among creditors. *In re Kinkead*, 7 B. R. 439; s. c. 3 Biss. 405.

The directors and stockholders can not be adjudged bankrupts on account of an act of bankruptcy committed by the corporation, although they are jointly and severally liable for its debts, for joint debtors are not affected by an act of bankruptcy committed by one of them. *James v. Atlantic Delaine Co.*, 11 B. R. 390.

(b) An order for the examination of a debtor upon proceedings supplemental to an execution is a legal process within the meaning of the act. *Brock v. Hoppock*, 2 B. R. 7; s. c. 2 Ben. 478.

If the concealment is a concerted measure between the debtor and some of his creditors, it is not an act of bankruptcy as against creditors not privy to the plot. *Barnes v. Billington*, 1 Wash. C. C. 29; s. c. 4 Day, 81, note.

Concealment from or denial to creditors is not an act of bankruptcy if it does not prevent the service of process. *Ibid.*

It is not an act of bankruptcy for a special partner to procure a general partner to leave the State. *In re Lyman Terry*, 5 Biss. 110.

(c) Procuring an attachment upon a fictitious debt, in order to prevent an attachment by a creditor, comes fairly within the language of this clause, because the words mean not only the physical removal or concealment, but the concealment of the actual title and position of property of whatever kind. *In re Williams & Co.*, 3 B. R. 286; s. c. Lowell, 496; s. c. 2 L. T. B. 100.

An allegation that the debtor concealed money with intent to prevent its being taken on legal process, which he knew was about to issue at the suit of one or more of his creditors, is sufficient. It is not necessary to state that there was any legal process in existence. *Fox v. Eckstein*, 4 B. R. 373.

The secrecy and concealment of goods, which constitutes an act of bankruptcy distinct from a fraudulent conveyance of them, must be an actual, not a constructive concealment of them by the bankrupt himself, or by his procurement, while they continue, in his intention, his own goods. *Livermore v. Bagley*, 3 Mass. 487.

**Fraudulent Conveyances.**—(d) It is not an element of this act of bankruptcy that the debtor shall be, at the time of committing it, bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, nor is any allegation to that effect necessary. *In re Dunham & Orr*, 2 B. R. 17; s. c.



2 Ben. 488; s. c. 1 L. T. B. 89; in re Randall & Sunderland, 3 B. R. 18; s. c. 1 Deady, 357; s. c. 2 L. T. B. 69; in re Nickodemus, 3 B. R. 230; s. c. 1 L. T. B. 140; s. c. 2 C. L. N. 49; s. c. 18, Pitts. L. J. 233; in re Thomas Ryan, 2 Saw. 411.

The intent means an actual design in the mind, and must be proved as a question of fact. In re Drummond, 1 B. R. 231; s. c. 1 L. T. B. 7; in re Cowles, 1 B. R. 280; s. c. 1 W. J. 367; Perry v. Longley, 2 B. R. 596; s. c. 8 A. L. Reg. 427; in re Goldschmidt, 3 B. R. 165; s. c. 3 Ben. 379.

The intent need exist only on the part of the person making the transfer. If that exist, the debtor clearly commits an act of bankruptcy, however innocent the intent of the preferred creditor or the person to whom the transfer is made. In re Drummond, 1 B. R. 231; s. c. 1 L. T. B. 7.

The question of intent to hinder, delay, or defraud creditors must be solved by looking at what the debtor says and does, and the effect thereof. Ecfort & Petring v. Greely, 6 B. R. 433; s. c. 4 C. L. N. 209; in re Thomas Ryan, 2 Saw. 411.

A mortgage given for a present consideration, which is used to relieve the mortgagor's stock from an attachment, and to pay the only overdue paper of the debtor known to the mortgagee, is not a transfer with the intent to delay creditors. In re Sandford, 7 B. R. 351.

A conveyance by a person whose property exceeds in value all that he owes, in consideration of an agreement that the grantee shall pay all the grantor's debts, and support him during the residue of his days, is not per se fraudulent and void as against creditors. In re Cornwall, 6 B. R. 805; s. c. 9 Blatch. 114; s. c. 2 L. T. B. 220.

If an insolvent firm is dissolved and the assets transferred to one of the partners who immediately executes a mortgage to secure a separate debt, the mortgage may be charged as a conveyance to hinder and delay creditors. In re Walte et al., Lowell, 407.

A transfer of the firm property by one partner to his copartner is not a conveyance to hinder or delay the firm creditors. In re Munn, 7 B. R. 408; s. c. 3 Biss. 442.

A transfer of the warehouse receipts and bills of lading of goods purchased for cash on delivery, to a banker to keep the bank account good, and putting off the vendor on various grounds, is legally, if not intentionally, fraudulent, in that it hinders, delays, and defrauds the vendor, although the vendee is induced thus to act by the stress of his circumstances, and may hope ultimately to pay the vendor. In re Picton, 11 B. R. 420; s. c. 2 Dillon, 548.

The conveyance of the whole property of a debtor affords a very violent presumption of a fraudulent intent, so far as existing creditors are concerned. When the effect necessarily is to delay creditors, the intent ought to be presumed. When the defense is that the property was conveyed in pursuance of a secret trust, under which it was held, and parol evidence, by the statute of frauds, can not be admitted to prove such trust, so that, in case of attachment or bankruptcy before the conveyance was made, the conveyance would be conclusively held to be in the debtor, it is questionable whether he ought to be admitted to show this alleged

trust even on the question of intent. When the petitioner is a witness, the fact that he has acted in a harsh and oppressive manner toward the debtor may be shown in evidence for the purpose of affecting his credibility. *In re W. B. Alexander et al.*, 4 B. R. 178; s. c. *Lowell*, 470; s. c. 2 L. T. B. 238; *Thornhill v. Link*, 8 B. R. 521.

Allowing property to be taken on a false and fictitious judgment is a transfer with intent to hinder, delay, and defraud creditors. *In re Schick*, 1 B. R. 177; s. c. 2 Ben. 5; s. c. 1 L. T. B. 28.

When a party has given a fictitious note, and procured an attachment thereon for the purpose of preventing an attachment by a real creditor, it is no defense that the real object of thus withdrawing the fund was not to defeat creditors generally but only that one particular creditor, and that it was the purpose of the debtor to use the money to pay other creditors. The immediate result was to give the debtor the secret control of the fund under the guise of an adverse attachment. It is impossible for the court to go beyond that result and determine upon doubtful evidence, or any evidence, that the parties intended, when the fund was illegally withdrawn from the ordinary reach of the law, to apply it more beneficially than the law itself would apply it. This is a fundamental principle of the law of fraudulent conveyances. *In re Williams & Co.*, 3 B. R. 286; s. c. *Lowell*, 406; s. c. 2 L. T. B. 100.

A debtor has the right to mortgage his property or a portion of it for the purpose of raising money to pay his debts, but a mortgage given for the purpose and with the manifest design of so incumbering his available means that creditors will be hindered and delayed in the collection of their demands, is fraudulent. *In re Cowles*, 1 B. R. 280; s. c. 1 W. J. 367; *Baldwin v. Rosseau*, 1 N. Y. Leg. Obs. 391.

A sale of all the debtor's property for a small portion in cash and the balance in long notes does to that extent delay creditors. *In re Dean & Garrett*, 2 B. R. 89.

The insertion of a power in a mortgage to enter and sell whenever the mortgagee may deem himself unsafe, is a suspicious circumstance. *In re Thomas Ryan*, 2 Saw. 411.

If the value of the property largely exceeds the mortgage debt, this is a badge of fraud. *Baldwin v. Rosseau*, 1 N. Y. Leg. Obs. 391.

The retention of possession by the mortgagor is a badge of fraud. *Ibid.*

Where the right to transfer a franchise is conferred by the Legislature, an assignment thereof may be made with intent to delay, hinder, or defraud creditors. *In re Southern Minn. R. R. Co.*, 10 B. R. 86.

**Assignment for the Benefit of Creditors.**—To make a general assignment for the benefit of creditors an act of bankruptcy within the meaning of this clause, it must be made with the intent to delay, defraud, or hinder creditors within the meaning of the statute of 13th Elizabeth, as exemplified in *Twynce's Case* and other subsequent decisions following it. It becomes a question of fact. The innocence or guilt of the act depends on the mind of him who did it, and it is not a fraud within the meaning of the bankruptcy act unless it was meant to be so. *Perry v. Longley*, 1 B. R. 559; s. c. 2 B. R. 596; s. c. 1 L. T. B. 34; s. c. 8 A. L.

Reg. 427; s. c. 7 A. L. Reg. 429; *Farrin v. Crawford et al.*, 2 B. R. 602; *Wells et al. (ex parte H. B. Claflin & Co.)*, 1 B. R. 171; s. c. 1 L. T. B. 20; s. c. 7 A. L. Reg. 163; in *re Potts & Garwood*, *Crabbe*, 469.

An assignment is to be subjected to the sharpest scrutiny, and any badge of fraud that attaches itself in the light of extraneous circumstances will, unless fully and satisfactorily explained, be fatal to its validity, and the arm of the bankruptcy law will sweep it away, and subject the person and estate of the debtor to its own provisions. When the assignor, through the agency of the assignee himself, retains a portion of the estate and converts it to his own use, to an amount much greater than he could hold under the exemption laws of the State, the assignment is fraudulent. *Farrin v. Crawford*, 2 B. R. 602; in *re Chamberlain et al.*, 3 B. R. 710.

An assignment by a solvent person for the benefit of creditors, with or without preferences, is void under the statute of frauds, because the necessary consequence of it is to delay and defraud creditors, by preventing them from subjecting the debtor's property, by the ordinary legal proceedings and process, to the satisfaction of their claims. An assignment which authorizes the assignee to sell on credit, or in any manner to prolong his possession of the property beyond the time reasonably necessary to convert it into cash and distribute it among the creditors, is fraudulent. In *re Randall & Sunderland*, 3 B. R. 18; s. c. 1 *Deady*, 557; s. c. 2 L. T. B. 69.

An assignment made with the intent to prevent creditors who are pressing suits to judgment from obtaining preference over other creditors, is not an act of bankruptcy. *Perry v. Longley*, 1 B. R. 559; s. c. 2 B. R. 596; s. c. 1 L. T. B. 34; s. c. 8 A. L. Reg. 427; s. c. 7 A. L. Reg. 429; *Wells et al. (ex parte H. B. Claflin & Co.)*, 1 B. R. 171; s. c. 1 L. T. B. 20; s. c. 7 A. L. Reg. 163.

**Contra.** The fact that the debtor made the assignment without intent to defraud any creditor, is of no consequence, provided that he had the intent to delay or hinder his creditors. An assignment made for the purpose of preventing creditors who have sued him from appropriating the assigned property toward the payment of their claims, is made to hinder and delay such creditors. In *re Goldschmidt*, 3 B. R. 165; s. c. 3 *Ben.* 379.

An intent to hinder, delay, or defraud one creditor, is such an intent as the bankruptcy act contemplates. *Perry v. Longley*, 1 B. R. 559; s. c. 1 L. T. B. 34; s. c. 7 A. L. Reg. 429. **Contra**, in *re Dunham & Orr*, 2 B. R. 17; s. c. 2 *Ben.* 488; s. c. 1 L. T. B. 80.

An application to have the security of the assignee's bond increased is not such an assent to the assignment as will estop the creditor from urging it as an act of bankruptcy. *Perry v. Longley*, 1 B. R. 559; s. c. 1 L. T. B. 34; s. c. 7 A. L. Reg. 429.

**Arrest of Debtor.**—(e) A debtor who has not been actually imprisoned for more than twenty days, on an order of arrest issued against him in a civil action founded upon a contract, can not be adjudged a bankrupt on account of such arrest. The statute evidently intends to draw a distinction between being actually imprisoned for more than twenty days, and being held in custody for a period of twenty days. It confines the former

to a civil action founded on contract, while it extends the latter to any demand in its nature provable against a bankrupt's estate. There are claims or demands which would fall within the first clause and not within the second clause. The first clause, has, therefore, a field for operation over which the second clause does not extend. This being so, and there being a distinction evidently intended by the statute between actual imprisonment and mere arresting and holding in custody — a person actually imprisoned being held in custody, although a person held in custody is not necessarily actually imprisoned — full effect must be given to the second clause. This can not be done if it be held that a person arrested in a civil action, founded on contract, may be adjudged bankrupt, although he has not been actually imprisoned for more than twenty days. If it be so held on the ground that a claim founded on a contract is a demand in its nature provable against a bankrupt's estate under the act, and that it is sufficient, under the first clause, that the debtor be arrested and held in custody, under mesne process founded on such claims, for a period of twenty days, then no cases exist which would not fall within the first clause, and the second clause would become inoperative, and might as well have been left out of the statute. A statute must be so construed, if possible, without doing violence to the language, as to give force, meaning, and effect to every part of it. There is no affirmative repugnancy between the two clauses, and sound principles of construction require that it shall be held to be the intention of Congress that cases falling within the second clause shall be governed wholly by the second clause, although, if the second clause had been omitted from the section, they would fall under the first clause. Even if the two clauses were repugnant to each other in a broader sense than they are, the second clause would control as being the later expression of the will of the law makers. *In re John Davis*, 3 B. R. 339; s. c. 3 Ben. 482.

The arrest and imprisonment are both necessary to constitute the act of bankruptcy. Either alone is not sufficient. Both do not exist until the term of imprisonment limited for that purpose has expired. *Nelms v. Pugh*, 1 Murph. 149.

If the *capias* upon which the arrest is made is not void, but voidable, the arrest is legal until it is set aside. If the debtor voluntarily submits to an arrest good upon its face for the period of twenty days, he commits an act of bankruptcy. If he is not insolvent, the law presumes that twenty days is long enough for him either to pay the debt, or procure bail to the action; or if he deem the arrest unlawful, to have its unlawfulness tested before the proper tribunal. If he neglects or delays within that time to obtain his discharge from duress in either of these ways, he commits the act of bankruptcy defined by the statute, and it is no defense that the order of arrest was subsequently set aside, and discharge granted to him upon giving common bail. *In re B. Cohn*, 7 B. R. 31; s. c. 29 Leg. Int. 309; s. c. 5 C. L. N. 14.

An imprisonment commencing on the forenoon of September 8, 1870, and terminating before noon on the 28th of that month, was held not

to be sufficient. In legal contemplation, the debtor was in prison nineteen entire days and portions of other two days, and the first day being excluded, this made only twenty days. *Hunt v. Pooke*, 5 B. R. 161.

**Insolvency.**—(f) Mere insolvency is not, of itself, ground for involuntary bankruptcy: for a man, actually insolvent, may continue his business for years by renewals and extensions and indulgences on the part of his creditors, and ultimately not only pay all indebtedness with interest, but achieve success. *Doan v. Compton & Doan*, 2 B. R. 607.

The act is not intended to cover all cases of insolvency to the exclusion of other judicial proceedings. It is very liberal in the class of insolvents which it does include, and needs no extension in this direction by implication. But it still leaves in a great majority of cases parties who are really insolvent to the chances that their energy, care and prudence in business may enable them finally to recover without disastrous failure or positive bankruptcy. All experience shows both the wisdom and justice of this policy. Many find themselves with ample means, good credit, and large business, totally insolvent, that is, unable to meet their current obligations as fast as they mature. But by forbearance of creditors, by meeting only such debts as are pressed, and even by the submission of some of their property to be seized on execution, they are finally able to pay all and save their commercial character and much of their property. If creditors are not satisfied with this, and the parties have committed an act of bankruptcy, any creditor can institute proceedings in a bankruptcy court. But until this is done, their honest struggle to meet their debts and to avoid the breaking up of all their business is not of itself to be construed into an act of bankruptcy or a fraud on the act. *Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 489.

The words "insolvent" and "insolvency" are not synonymous with the words "bankrupt" and "bankruptcy." Insolvency means an inability to pay debts in the ordinary course of business; bankruptcy means a particular legal status, to be ascertained by a judicial decree. In *re Black & Secor*, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39; in *re Craft*, 2 B. R. 111; s. c. 6 Blatch. 177; *Morgan, Root & Co. v. Mastick*, 2 B. R. 521; *Buckingham v. McLean*, 13 How. 151; s. c. 3 McLean, 185; *Jones v. Howland*, 49 Mass. 377; *Lonergan v. Fenlon*, 7 Pitts. L. J. 266. Contra, in *re Henry Brenneman*, Crabbe, 456; *Arnold v. Maynard*, 2 Story, 349; *Morse v. Godfrey*, 3 Story, 364; *Everett v. Stone*, 3 Story, 446; *Winsor v. Kendall*, 3 Story, 507; *Ashby v. Steere*, 2 W. & M. 347; *Atkinson v. Farmers' Bank*, Crabbe, 529; *Dennett v. Mitchell*, 6 Law Rep. 16; s. c. 1 N. Y. Leg. Obs. 356; *Hutchins v. Taylor*, 5 Law Rep. 289.

The words "in contemplation of bankruptcy," mean in contemplation of committing what is made by the act an act of bankruptcy, or of voluntarily applying to be decreed a bankrupt. In *re Craft*, 1 B. R. 378; s. c. 2 Ben. 214.

An allegation that the debtor was insolvent or in contemplation of bankruptcy, is insufficient, as it is impossible to say which is to be relied on. In *re John R. Hanibel*, 15 B. R. 233; s. c. 9 C. L. N. 165.

Insolvency means an inability to pay debts, as they mature and become due and payable, in the ordinary course of business, as persons carrying on trade usually do, in that which is made, by the laws of the United States, lawful money and a legal tender to be used in the payment of debts, without reference to the amount of the debtor's property, and without reference to the possibility or probability or even certainty that at a future time, on the settlement and winding up of all his affairs, his debts will be paid in full out of his property. Nothing else is a legal tender in payment of debts but that which is declared by the law of the United States a lawful money and a legal tender in the payment of debts. Property is not a lawful tender in payment of debts, and a debtor has no right to pay a debt with property of any kind. Therefore, the amount of the trader's property is of no consequence, if such inability to pay matured debts in such lawful money exists. *Hardy v. Clark*, 3 B. R. 385; s. c. 1 L. T. B. 151; s. c. 3 L. T. B. 11; s. c. 17 Pitts. L. J. 61; s. c. 2 C. L. N. 121; in re *Williams & Co.*, 3 B. R. 286; s. c. *Lowell*, 406; s. c. 2 L. T. B. 100; in re *Rodgers & Coryell*, 2 B. R. 397.

This is the only construction which is adapted to give effect to the bankruptcy act for the beneficial purposes for which it was designed. Without this, the trader's property may be wasted, preferences among creditors be given, and other transfers of his property be effected, wholly inconsistent with the intent of the act. To hold that the probability that, if the estate should be judiciously managed, it would, after the lapse of some indefinite time, at prices corresponding with its then estimated value, produce enough to pay the creditors, if they also would wait, and not force sales by judgments and executions, is to constitute proof of solvency within the meaning of the law, would be neither sensible nor just. But insolvency is not to be inferred in every instance of temporary want of money to pay notes coming to maturity. This would be tantamount to holding that, whenever a trader suffers a note to go to protest for want of funds in hand wherewith to pay, he can thereupon be adjudged insolvent. This would be an extreme view. *Hardy v. Binninger*, 4 B. R. 262; s. c. 7 Blatch. 262.

Inability to pay one debt in the ordinary course of business is sufficient. The ordinary "course of business" does not mean an ability to turn out goods, or bills receivable, or assets or securities to pay that one particular debt, at the same time leaving other debts which are certain to become due, unprovided for, and not leaving sufficient assets in the hands of the debtor to meet them when they become due. That is an extraordinary course of business. In re *Dibblee et al.*, 2 B. R. 617; s. c. 3 Ben. 283; *Driggs v. Moore, Foote & Co.*, 3 B. R. 602; s. c. 1 Abb. C. C. 440.

A solvent man is one that is able to pay all his debts in full at once, or as they become due. Insolvency is merely the opposite of solvency. A man who is unable to pay his debts out of his own means, or whose debts can not be collected out of such means by legal process is insolvent; and this although it may be morally certain that, with indulgence from his creditors, in point of time, he may be ultimately able to satisfy his

engagements in full. The term insolvency imports a present inability to pay. The probable or improbable future condition of the party in this respect does not affect the question. If a man's debts can not be made in full out of his property by levy and sale on execution, he is insolvent within the primary and ordinary meaning of the word, and particularly in the sense in which the word is used in the bankruptcy act. In *re Wells*, 3 B. R. 371; s. c. 2 C. L. N. 49; in *re Randall & Sunderland*, 3 B. R. 15; s. c. 1 Dedy, 557; s. c. 2 L. T. B. 69; in *re Oregon B. Printing Co.*, 13 B. R. 503; s. c. 11 Pac. L. R. 232; s. c. 3 Cent. L. J. 515.

If the debtor is unable to pay his debts as they become due, the burden of proving that his property is sufficient to pay his debts rests upon him. In *re Thomas Ryan*, 2 Saw. 411.

The act has far less reference to the condition of mind of the insolvent debtor than to the condition of insolvency as a fact. When a debtor knows that he is insolvent, he must wait, before he gives a preference, until he knows that his condition is changed, or that his creditors consent to the preference. It is a general principle, to which there are no exceptions, that, where the parties know the insolvency, they must act at their peril if they appropriate the trust fund which the law devotes to the equal payment of all, before they also know that creditors have ceased to be such, or that they consent, after the most full and fair disclosures, to the discrimination which is made. Without this it is an act of bankruptcy. It is an irrelevant fact that they erroneously supposed that creditors had consented. Their careless, rash, or interested conclusions give them no power over the statutory vested rights of innocent and nonconcurring creditors. *Curran v. Munger*, 4 B. R. 295; s. c. 6 B. R. 33.

A petitioning creditor is not required to make full and complete proof of the debtor's insolvency, but may offer evidence tending to show his insolvency, and the debtor must then explain the evidence if possible, for he is best acquainted with the condition of his own affairs. In *re Oregon B. Printing Co.*, 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.

A debtor admitting insolvency by his acts is conclusively presumed to contemplate insolvency. In *re Waite & Crocker*, 1 B. R. 273; s. c. Lowell, 207.

Where there is no proof that the acts were done in contemplation of bankruptcy, the petition should aver that the debtor was insolvent or in contemplation of insolvency, and this is the only averment that should be made. In *re Craft*, 1 B. R. 378; s. c. 2 B. R. 111; s. c. 2 Ben. 214; s. c. 6 Blatch. 177; in *re Haughton*, 1 B. R. 460.

The giving as security of a warrant of attorney to confess judgment, on which the creditor may enter judgment at any time, by no means, of itself, raises any presumption of insolvency. In *re Dibblee et al.*, 2 B. R. 617; s. c. 3 Ben. 283.

A voluntary contribution received by a debtor does not constitute a debt due by him. In *re Oregon B. Printing Co.*, 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.

The fact that the bonds of a railroad corporation are at a mere nominal

value does not make the corporation insolvent. *Tucker v. Opelousas & Gt. Western R. R. Co.*, 3 B. R. (quarto) 31.

Whether a debtor knows that he is insolvent, or purposely and willfully refuses to know by shutting his eyes to the facts before him, the result is the same. In one case, the fact of knowledge; in the other, an unavoidable legal inference. *Farrin v. Crawford et al.*, 2 B. R. 602.

When a party is in fact insolvent, but denies insolvency under oath, it will be presumed that he was ignorant of the legal definition of the term insolvency, and that such ignorance led to such denial. *In re S. T. Smith*, 3 B. R. 377; s. c. 4 Ben. 1; s. c. 1 L. T. B. 147.

A trader unable to pay his debts in the ordinary course of business is insolvent *prima facie*, and it is incumbent on him to show that he is not so in fact. The rule does not apply with the same strictness to farmers, and as to them the rule is reversed. The petitioning creditor must take the onus of showing actual insolvency. *Miller v. Keys*, 3 B. R. 224.

It will not do to say that the act of making a transfer of property, or of procuring or suffering property to be taken on legal process, with the intent named, is an act of bankruptcy, whether the debtor is or is not otherwise shown to be bankrupt or insolvent, or to be contemplating bankruptcy or insolvency, on the idea that the act becomes *ipso facto* one in contemplation of bankruptcy, because, it being an act of bankruptcy, and thus being bankruptcy, the doing of it must have been in contemplation of bankruptcy. This is reasoning in a circle, and such a view would not require that the debtor should even be insolvent, or contemplate insolvency, and would virtually strike those words out of the section; for if it were shown that the debtor had done the act named with the intent named, the fact that he had done it in contemplation of bankruptcy would follow as an inevitable legal conclusion, and insolvency, or the contemplation of it, would never become an operative prerequisite. The debtor must be shown, aside from the mere doing of the act named with the intent named, to have done it when bankrupt or insolvent, or in the contemplation of bankruptcy or insolvency. *In re Craft*, 1 B. R. 378; s. c. 2 Ben. 214.

If, at the time of committing the act named, the debtor, in his own mind, from a view of the state of things which surround him, contemplated that he would not be, and continue to be, from that time thenceforth, able to pay his debts, as such debts should mature in the ordinary course of his business, then he contemplated insolvency; and, if he contemplated insolvency, that puts the case in precisely the same predicament as though he were insolvent. A debtor has no more right to do the forbidden act when he contemplates that in view of the existing aspect of his affairs, he will not be able to pay his debts in the ordinary course of his business, than he would have if he were actually insolvent at the time. *In re Dibblee et al.*, 2 B. R. 617; s. c. 3 Ben. 283.

**Preferences.**—(29) In an act of bankruptcy under this clause, there are the following ingredients, to wit:

1st. The debtor must either be insolvent, or contemplate insolvency.



2d. He must make a conveyance or transfer of money or property, or he must procure his property to be taken on legal process.

3d. He must do this with intent, on his own part, to give a preference to the creditor; or with the intent, on his own part, to defeat or delay the operation of the act. *Ibid.*

**Legal Process.**—An allegation which does not set forth any specified day on which the property was taken on legal process, simply charging that the act of bankruptcy was committed on the blank day of blank, 1860, and in which the only other allegation of the time of its commission is, that it was committed within six months next preceding the date of the petition, which is not dated, but which was sworn to three days before it was filed, is defective. *In re Chappel*, 4 B. R. 540.

There is a clearly recognized distinction between procuring and suffering. The word "suffer" is different from the word "procure." "Suffer" implies a passive condition, so to speak, as to allow, to permit; not a demonstrative, active course, like the word "procure." *In re Black & Secor*, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39; *in re Craft*, 1 B. R. 378; s. c. 2 Ben. 214; *in re Sutherland*, 1 B. R. 531; s. c. 1 Deady, 344; *in re Dibblee et al.*, 2 B. R. 617; s. c. 3 Ben. 283; *in re Haughton*, 1 B. R. 460; *in re Heller*, 3 Biss. 153; *in re A. B. Gallinger*, 4 B. R. 729; s. c. 1 Saw. 224; *Traders' Nat'l Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87.

Mere honest inaction, when a creditor seeks to make a just debt by law, is not itself an act of bankruptcy. The debtor's failure through inability to go into voluntary bankruptcy when he was sued, is not of itself an act of bankruptcy. *Wright v. Filley*, 4 B. R. 611; s. c. 1 Dillon, 171; *Love v. Love*, 21 Pitts. L. J. 101. *Contra*, *in re Black & Secor*, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39; *in re Heller*, 3 Biss. 153; *in re Wells*, 3 B. R. 371; s. c. 2 C. L. N. 49; *in re A. B. Gallinger*, 4 B. R. 729; s. c. 1 Saw. 224; *Bonnett v. James*, 1 N. Y. Leg. Obs. 310.

It is not enough that the debtor is passive, and does nothing to prevent a creditor from taking his goods on execution. The words of the act can be satisfied with nothing short of a positive agency, an active co-operation. To be passive merely and to do nothing, is not to procure an act to be done. It is not to aid, co-operate, or advise. *Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131.

If the issuing of an execution on a judgment confessed under a power of attorney is not done at the request of the debtor, and was not agreed upon at the time of the execution of the power, it is not an act of procurement. *Barnes v. Billington*, 1 Wash. C. C. 29; s. c. 4 Day, 81, note.

If a suit is commenced with the debtor's knowledge or assent, express or implied and in consequence of information which he voluntarily communicated to the creditor for the express purpose of having measures taken to secure the debt, he procures his property to be taken. *Van Kleeck v. Thurber*, 1 Penn. L. J. 402.

An agreement by the debtor that a default may be taken against him at a time when it could have been entered according to the usual course of

the court without that agreement, is not a procurement of the taking of his property on legal process. *Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131.

If a debtor voluntarily aids his creditor in taking his property on a writ of attachment, or in perfecting an attachment previously incomplete, he procures it to be taken. *Fisher v. Currier*, 5 Law Rep. 217; s. c. 1 Penn. L. J. 217.

If the debtor instructs the attorney who holds a judgment note to enter up judgment and issue execution, he procures the issuing of the execution although he does so at the request of the creditor. *In re A. Benton & Bro.*, 3 W. N. 547.

It is not an act of bankruptcy for a debtor to suffer his property to be taken on legal process with intent to give a preference, or to defeat or delay the operation of the act. *In re Isaac Scull*, 10 B. A. 165; s. c. 7 Ben. 371; s. c. 1 A. L. T. (N. S.) 416.

A debtor who confesses judgment in favor of a creditor procures his property to be taken on legal process. *In re Craft*, 1 B. R. 378; s. c. 2 Ben. 214; *in re Sutherland*, 1 B. R. 531; s. c. 1 Deady, 344; *in re A. B. Gallinger*, 4 B. R. 729; s. c. 1 Saw. 224.

The mere admission of service of the summons does not amount to a procuring of his property to be taken on legal process, where it is only done at the instance of the creditor's attorney, and without any collusion or complicity between the parties. *In re Dwight B. King*, 10 B. R. 103.

An execution is the legal purpose of a judgment, its end and fruit. The motive and intention of a man can only be judged from the tendency of his acts. A man generally designs to do that to which his acts tend. Every ordinary person knows that a judgment is regularly followed by an execution—in other words, that the tendency of procuring a judgment is that the execution shall follow. It is not an absolute legal inference that a man who procures a judgment to be obtained against himself intends that an execution shall follow, but a question of fact. *In re Thomas Woods*, 7 B. R. 126; s. c. 29 Leg. Int. 236; 20 Pitts. L. J. 21.

The question is whether the debtor willfully facilitated, either directly or indirectly, the taking of his property on execution. *Ibid.*

The confession of a judgment by an insolvent debtor, with the intent to enable a creditor to secure his debt by converting his lien by attachment into a lien by judgment, execution, and levy, is an act of bankruptcy. *In re A. B. Gallinger*, 4 B. R. 729; s. c. 1 Saw. 224.

The nature of the debtor's business and the course of his dealings will be regarded in deciding whether the giving of a warrant to confess judgment is an act of bankruptcy. *In re Leeds*, 1 B. R. 521; s. c. 7 A. L. Reg. 636; s. c. 1 L. T. B. 78; *in re Ralph Johnson*, 1 N. Y. Leg. Obs. 166; s. c. 5 Law Rep. 313.

Where the judgment is confessed under a warrant of attorney, it should be clearly established that the warrant was given by the proper authority. *Hilton v. Telegraph Co.*, 1 Cent. L. J. 75.

Where the alleged act of bankruptcy consists in suffering property to be taken on legal process, the district court should give the debtor a reason-

able time to contest the validity of the judgment in the State court. *Ibid.*

Allowing property to be taken on legal process issued upon a judgment confessed, under a warrant of attorney given at a time when the debtor was not insolvent, is an act of bankruptcy when the other elements of such an act coexist. In *re Dibblee et al.*, 2 B. R. 617; s. c. 3 Ben. 283. *Contra*, *J. B. Wright*, 2 B. R. 490.

The petition should aver that the property was taken on the day of the levy, and not on the day of the giving of the warrant of attorney. In *re Dibblee et al.*, 2 B. R. 617; s. c. 3 Ben. 283.

When a State court has permitted a judgment to be entered up, and execution to be issued, the district court must presume that this was done in the legal and proper way. It must treat the record of the State court as being in due form. Irregularities can not be considered in a collateral proceeding. *Ibid.*

The term legal process, as used in the bankruptcy act, is not to be confined to any particular form of writ, execution or attachment. An order of sale to be executed by a master of chancery is, in a just and proper sense, legal process; though in a technical sense, writs, executions, attachments, and the like, running in the name of the people, and addressed to the sheriff, or like officer, are usually meant by that term. The writ, mandate, or order of a court taking hold of the property, and withdrawing it from the possession and control of the debtor, and from the ordinary reach of creditors for the payment of what is due to them, are each and either of them within the intent and true meaning of the term legal process, as employed in this section. *Hardy v. Binninger*, 4 B. R. 262; s. c. 7 Blatch. 262.

The fact that the bankruptcy act makes, in broad terms, the procuring of property to be taken on legal process, with certain attendant circumstances, an act of bankruptcy, shows that the circumstance that the property is taken on legal process issued out of a State court furnishes no ground for withholding an adjudication of bankruptcy. On the contrary, in view of the well-known fact that the mass of civil legal process is issued out of the courts of the States all over the United States, and that the amount of property taken on civil legal process issued out of the Federal courts is comparatively very small, it is evident that Congress intended to say that the taking of property on legal process issued out of a State court is an act of bankruptcy, when accompanied by the other conditions specified in this section. *Hardy v. Clark*, 3 B. R. 385; s. c. 1 L. T. B. 151; s. c. 3 L. T. B. 11; s. c. 17 Pitts. L. J. 61; s. c. 2 C. L. N. 121.

Procuring property to be taken under an order appointing a receiver, passed in an action instituted by the attorney-general of the State for the purpose of obtaining a dissolution of the corporation, is procuring it to be taken on legal process. In *re Washington Marine Ins. Co.*, 2 B. R. 648; s. c. 2 Ben. 292; in *re Merchants' Ins. Co.*, 6 B. R. 43; s. c. 3 Biss. 162; s. c. 2 L. T. B. 243.

The collection of a claim by a receiver is not a taking of the property on legal process in the sense of the statute, for the property was so taken

by the appointment and not the subsequent collection. *In re Amsterdam Fire Ins. Co.*, 6 Ben. 368.

**Intent to Prefer.**—An allegation of a preference should give the name of the preferred creditor. *In re Joseph S. Hadley*, 12 B. R. 366.

An allegation of a preference need not charge that it was in fraud of the provisions of the bankruptcy law. *Ibid.*

The property of an insolvent represents, in whole or in part, the credit given to him by his creditors, and therefore, in good morals, belongs to them and not to him. Strictly and truthfully speaking, an insolvent has no property, and, therefore, has no natural right to dispose of the property in his possession otherwise than with the consent of the real owners — his creditors. *In re Silverman*, 4 B. R. 523; s. c. 2 Abb. C. C. 243; s. c. 1 Saw. 410; *Story v. Nowlan*, 1 Mont. 350.

The definition of a preference is a payment or transfer to one creditor which will give him an advantage over the others, or which may possibly do so. *In re Hapgood et al.*, 7 A. L. Rev. 664; *Miller v. Keys*, 3 B. R. 224.

If a debtor effects a compromise with a portion of his creditors, of such a character that when they are paid, he is left undoubtedly and abundantly solvent, such payment is not an act of bankruptcy. *In re Hapgood et al.*, 7 A. L. Rev. 664.

A mortgage by a railroad company of all its property, to secure all its creditors equally out of its earnings, or to pay such as refuse the security their ratable proportion of the proceeds, is not an act of bankruptcy. *In re Union Pacific Railroad Co.*, 10 B. R. 178; s. c. 8 A. L. Rev. 779; s. c. 6 O. L. N. 355; s. c. 31 Leg. Int. 261.

A mortgage given in lieu of a mechanic's lien claim is not a preference, for the creditor gains no advantage. *In re Christopher Weaver*, 9 B. R. 132.

The intent is an element of the objectionable transaction according to the letter of the law, and though a person is presumed to intend the natural results of his acts, the intent is essential, and must be shown by his acts and the circumstances. *Miller v. Keys*, 3 B. R. 224.

This intent must be an intent on the part of the debtor; and, unless the debtor at the time knew that he was insolvent, or contemplated insolvency, he could have no intent to give a preference to one creditor over another. If a person, while paying one creditor, honestly supposes that he is able to pay every creditor, there can be no intent to give a preference. *In re Dibblee et al.*, 2 B. R. 617; s. c. 3 Ben. 283.

Where the probable consequence of an act is to give a preference, the debtor will be conclusively presumed to have intended to give such preference. *In re Drummond*, 1 B. R. 231; s. c. 1 L. T. B. 7; *in re Black & Secor*, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39; *in re Sutherland*, 1 B. R. 531; s. c. 1 Deady, 314; *in re Dibblee et al.*, 2 B. R. 617; s. c. 3 Ben. 283; *in re Wells*, 3 B. R. 371; s. c. 2 C. L. N. 49; *Curran v. Munger*, 6 B. R. 33; *Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131.

When a debtor is insolvent, and knows it, any payments then made by him to any creditor in full, are with the intent to prefer. The giving of a preference is a necessary consequence of the payment by an insolvent

debtor of one of his creditors. The creditor is preferred because he has received his debt, and the other creditors have not. The debtor being insolvent has not the means to pay them, and by paying one in full has defrauded the others of their just proportion of his estate. Other motives may have actuated the debtor, but that makes the payment none the less a preference. Indeed, he may expect to become able in time to pay all his creditors in full, and may intend to do so as soon as he can; but this does not affect the question. The creditor whose debt is paid is nevertheless preferred. He has his money, but they must depend upon the often double uncertainty whether their debtor will in time become both able and willing to pay their debts in full. *Farrin v. Crawford*, 2 B. R. 602; *in re Silverman*, 4 B. R. 523; s. c. 2 Abb. C. C. 243; s. c. 1 Saw. 410.

If a debtor is insolvent at the time of making a payment, he is presumed to know it until the contrary appears. *In re Silverman*, 4 B. R. 523; s. c. 2 Abb. C. C. 243; s. c. 1 Saw. 410; *in re Samuel A. House*, 1 N. Y. Leg. Obs. 348.

The law will not presume an intent to prefer when the debtor is not aware of his insolvency, but it is incumbent on him to show it. *In re Oregon B. Printing Co.*, 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.

No particular or specific evidence of an intent to prefer is necessary when a payment is made by an insolvent debtor, for the act itself is sufficient evidence of the intent. *Ibid.*

A payment by an insolvent debtor is an act of bankruptcy, although it is made in the usual course of business. *Ibid.*

Where the defense is that the securities belonged to the creditor on account of an alleged fraud, the burden of proof is on the debtor to establish the fraud and the identity of the securities by a fair preponderance of evidence. *Payne v. Solomon*, 14 B. R. 162.

If a debtor purchases gold certificates by means of an overdraft on a bank, under an agreement that the proceeds of all overdrafts of his shall be the property of the bank, or with the preconceived idea of never paying back the money obtained by the overdraft, but of defrauding the bank, a transfer of the certificates to the bank is not an act of bankruptcy. *Ibid.*

There is a distinction between an agreement that securities purchased with the proceeds of an overdraft shall all the time be considered the property of the bank, and an agreement to turn over the title as a future act. *Ibid.*

If a bank merely certifies the check of a debtor in advance, relying on his promise to make his account good during the day, such an overdraft, in the absence of fraud, creates simply the relation of debtor and creditor, and the payment of such a debt after insolvency occurs, is an act of bankruptcy. *Ibid.*

A mere agreement by a debtor that, in a certain event, he will deliver to the bank such securities as he may purchase with the proceeds of overdrafts, will not vest a title to the securities in the bank, so that a transfer of them will not be a preference. *Ibid.*

A mortgage of the whole stock in trade to a pre-existing creditor is *prima facie* a preference. It is very strong evidence, because it is out of the ordinary course of business, and is of itself enough, if duly recorded, to destroy the credit of any trader; and, therefore, would not be resorted to by any one who had readier means of paying the debt. *In re Waite et al.*, Lowell, 407.

If a dissolution is a mere cover to conceal either actual or legal fraud, or with intent to give a preference to a separate creditor over those of the partnership, or to bring him on an equality with them in the distribution of the assets of the firm, there is such a fraud on the partnership creditors as will make it an act of bankruptcy. *In re J. A. & H. W. Shouse, Crabbe*, 482.

If an insolvent firm is dissolved, and all its assets transferred to one partner, who immediately executes a mortgage to secure a separate debt, the act is voidable by the joint creditors, and they may rely on the mortgage, or on the dissolution of the firm, or on both, for the dissolution itself works a preference to the separate creditors. *In re Waite et al.*, Lowell, 407; *in re J. A. & H. W. Shouse, Crabbe*, 482.

An unexecuted agreement by a company to transfer certificates of its stock is not an act for which it can be forced into bankruptcy. *Winter v. R. R. Co.*, 7 B. R. 289; s. c. 2 Dillon, 487.

A conveyance attempted to be made by an instrument void for want of a stamp is not an act of bankruptcy. *In re Dunham & Orr*, 2 B. R. 17; s. c. 2 Ben. 488; s. c. 1 L. T. B. 89.

The intent of a debtor to prefer, coupled with an attempt to do it, is an act of bankruptcy, although the instrument is so defective as to be void. *In re S. Mendelsohn*, 12 B. R. 533; s. c. 3 Saw. 343.

The giving of a mortgage during solvency to secure an existing bona fide debt is not an act of bankruptcy, although made with the intent to prefer the mortgage creditor. *In re Dunham & Orr*, 2 B. R. 17; s. c. 2 Ben. 488; s. c. 1 L. T. B. 89.

The return of unearned premiums upon the cancellation of the policy does not constitute an act of bankruptcy where the parties believe they have the legal right to receive and pay these sums. *Knickerbocker Ins. Co. v. Comstock*, 9 B. R. 484; s. c. 6 C. L. N. 142.

Where a payment which is alleged to have been a preference, was made by an officer of the corporation, evidence must be given to show that it was the act of the corporation. *Ibid.*

Though insolvency in fact exists, yet if the debtor honestly believes he shall be able to go on in his business, and, with such belief, pays a just debt, without a design to give a preference, such payment is not fraudulent, though bankruptcy should afterward ensue. And, on the other hand, if the debtor, being insolvent and knowing his situation, and expecting to stop payment, shall then make a payment, or give a security to a creditor for a just debt, with a view to give him a preference over the general creditors, such payment or giving security is fraudulent as against the creditors. It rests upon the intent with which the act was done, and the intent is to be proved as a fact, either by direct evidence, or as the necessary and certain consequence of other facts clearly proved.

**Morgan, Root & Co. v. Mastick**, 2 B. R. 521; **Doan v. Compton & Doan**, 2 B. R. 607.

An insolvent debtor has the right to pay out money or make changes in his property before an actual adjudication of bankruptcy, if he does it in good faith, without injury to the right of his creditors, and especially when he saves property and increases his assets. A payment of rent may be made to prevent a forfeiture of the lease. **Smith v. Teutonia Ins. Co.**, 4 C. L. N. 130. *Contra*, in re **Merchants' Ins. Co.**, 6 B. R. 43; s. c. 3 Biss. 162; s. c. 2 L. T. B. 243.

Agents may retain the money in their hands for the payment of their salaries. A check drawn by the secretary for his own monthly salary, and that of the clerks in the office, upon the bank where the company account is kept, he being the only person who can sign checks, is not an act of bankruptcy when it is drawn without the sanction or approval of the officers. **Smith v. Teutonia Ins. Co.**, 4 C. L. N. 130.

A mortgage of partnership property made by one partner to his co-partner is not an act of bankruptcy as against the firm creditors, for the property is not put out of the firm. In re **Kenyon & Fenton**, 6 B. R. 238; s. c. 1 Utah Ter. 47.

A preference to an employee is an act of bankruptcy. The law gives to an employee a priority to the amount of \$50, but this must be secured, if at all, by and through the proceedings in bankruptcy, and not outside of them, or independent of or in spite of this act. *Ibid.*

The return of a piano bought to fill a special order, and refused by the party for whom it was designed on its arrival, is not a preference. **Doan v. Compton & Doan**, 2 B. R. 607.

The fact that the debt is a fiduciary debt is of no consequence. The debtor has no more right to pay it than any other debt. There is no distinction between giving a preference when the creditor asks for it, and giving a preference when the creditor does not ask for it. In re **Dibblee et al.**, 2 B. R. 617; s. c. 3 Ben. 283; in re **Batchelder**, 3 B. R. 150; s. c. **Lowell**, 373.

Neither a sale which contemplates a higher degree of solvency, nor a sale from inability to resist, constitutes an act of bankruptcy, when no preference is given nor creditors delayed in the prosecution of their claims. **Rankin & Pullan v. Florida, Atlantic & G. C. Railway Company**, 1 B. R. 647; s. c. 1 L. T. B. 85.

Evidence that an assignment of a bill of lading was made in trust for all the creditors is admissible, for the act is of an uncertain and doubtful character. In re **Potts & Garwood**, **Crabbe**, 469.

If there is a preference, it is an act of bankruptcy, no matter how small the amount or meritorious the creditor. In re **J. A. & H. W. Shouse**, **Crabbe**, 482.

A security given at the time of receiving a loan is not a preference. *Ibid.*

A preference is an act of bankruptcy, although it is given under pressure. **Gassett v. Morse**, 21 Vt. 627; in re **Henry Brenneman**, **Crabbe**, 456; **Arnold v. Maynard**, 2 Story, 349.

A preference is an act of bankruptcy, although it is given in pursuance of a promise made at the time of contracting the debt. *Arnold v. Maynard*, 2 Story, 349.

The knowledge or motive of the preferred creditor is immaterial in an involuntary proceeding. In *re Oregon B. Printing Co.*, 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.

**Intent to Defeat the Operation of the Bankruptcy Act.**—(h) The question of intent is a question of fact. The innocence or guilt of the act depends upon the mind of him who did it, and is not a fraud within the meaning of the bankruptcy act, unless it was meant to be so. *Perry v. Longley*, 1 B. R. 559; s. c. 2 B. R. 596; s. c. 1 L. T. B. 34; s. c. 7 A. L. Reg. 429; s. c. 8 A. L. Reg. 427; *Wells et al. (ex parte H. B. Claffin & Co.)*, 1 B. R. 171; s. c. 1 L. T. B. 20; s. c. 7 A. L. Reg. 163.

Every person of a sound mind is presumed to intend the necessary natural or legal consequences of his deliberate act. The legal presumption may be either conclusive or disputable, depending upon the nature of the act and the character of the intention. And when, by law, the consequences must necessarily follow the act done, the presumption is ordinarily conclusive, and can not be rebutted by any evidence of a want of such intention. In such a case, the oath of the defendant is not sufficient to destroy such legal presumption, even in a suit which is brought to a hearing upon bill and answer without the filing of any replication. When the result which necessarily and inevitably follows an act is to defeat the operation of the bankruptcy act, the law conclusively presumes that the party intended to accomplish that result, and his denial of such an intent is of no consequence. In *re S. T. Smith*, 3 B. R. 377; s. c. 4 Ben. 1; s. c. 1 L. T. B. 147; *Hardy v. Clark*, 3 B. R. 385; s. c. 3 L. T. B. 11; s. c. 1 L. T. B. 151; s. c. 17 Pitts. L. J. 61; s. c. 2 C. L. N. 121.

The motives of the debtor in committing the act are immaterial. It is no defense that other considerations were the moving cause. Motive should not be confounded with intent. When he intends to do the thing which necessarily hinders and defeats the act, he, in judgment of law, knows when he does it that it will have that effect. Knowing the effect, he must intend to produce it when he voluntarily chooses to do the act. Whatever his motive is, he acts voluntarily in choosing, and therefore in intending all the legal results which flow from his action in the matter. *Hardy v. Binninger*, 4 B. R. 262; s. c. 7 Blatch. 262.

An assignment for the equal benefit of all creditors is in contravention of the spirit and policy of the bankruptcy act, even when made in good faith. The intention of the act clearly is, that when a failing debtor is conscious of his inability to prosecute his business, and pay his debts, he should at once subject his property to such a disposition as the bankruptcy act has provided for. The property then becomes a sacred trust for the benefit of creditors, who have a right to insist that it shall be administered, not according to the wish or preference of the insolvent, or in accordance with the insolvent laws of a State, but according to the provisions of the national bankruptcy act. Practically an assignment defeats or delays the operation of the act. It deprives creditors of a legal right under the stat-



ute, and is clearly in contravention of its spirit and its letter. It commits the disposition and the distribution of the property to an assignee selected by the debtor, and deprives his creditors of the right given them by the bankruptcy act to choose an assignee for that purpose; it takes from the courts of bankruptcy the legal supervision and control — the legal and equitable jurisdiction — which they, under the act, are to exercise in respect to such property, and the hostile claims and adverse interests of the creditors, and the marshaling of the debtor's assets, as well as in respect to his conduct, property, and person; and it also defeats its operation in many other respects, by preventing the property assigned from being brought within the operation and protection of numerous minor provisions of the act, and within the protection of other provisions of great importance, the infraction of which is punished as a heinous crime. Such an assignment necessarily and absolutely defeats the operation of the bankruptcy act. The provisions of the statute fully authorize, if they do not absolutely require, this construction. *Perry v. Longley*, 1 B. R. 559; s. c. 1 L. T. B. 34; s. c. 7 A. L. Reg. 429; in re S. T. Smith, 3 B. R. 377; s. c. 4 Ben. 1; s. c. 1 L. T. B. 147; *Anon.*, 3 B. R. 78; *Spicer v. Ward*, 3 B. R. 512; *Curran v. Munger*, 6 B. R. 33; in re *Goldschmidt*, 3 B. R. 165; s. c. 3 Ben. 379; in re *Pierce & Holbrook*, 3 B. R. 258; s. c. 16 Pitts. L. J. 204; in re *Randall & Sunderland*, 3 B. R. 18; s. c. 1 Deady, 557; s. c. 2 L. T. B. 69; in re *Wells et al. (ex parte H. B. Clafin & Co.)*, 1 B. R. 171; s. c. 1 L. T. B. 20; s. c. 7 A. L. Reg. 163; in re *Burt*, 1 Dillon, 439; in re *Henry Brenneman, Crabbe*, 456; *Globe Ins. Co. v. Cleveland Ins. Co.*, 14 B. R. 311; s. c. 8 C. L. N. 258. Contra, *Perry v. Longley*, 2 B. R. 596; s. c. 8 A. L. Reg. 427; in re *Kintzing*, 3 B. R. 217; *Smith v. Teutonia Ins. Co.*, 4 C. L. N. 130; in re *Charles J. Marter*, 12 B. R. 185.

When an insolvent debtor has given preferences, by means of chattel mortgages, and then subsequently made an assignment, the preferences can not be set aside, unless the creditors can proceed in bankruptcy, and have the assignment declared void. In re S. T. Smith, 3 B. R. 377; s. c. 4 Ben. 1; s. c. 1 L. T. B. 147.

A mortgage which stipulates for the payment of all the debts of the mortgagor at the end of six months, and secures to the debtor the right, with the consent of a party selected by himself, to continue his business, including the purchase of more goods, until a breach of the condition of the mortgage, sets creditors at defiance for six months, and necessarily delays and defeats the operation of the bankruptcy act. If the debtor can do this legally for six months, it is difficult to see how, in principle, he can be restrained from securing like immunity for six years by the same method. In re *Chamberlain et al.*, 3 B. R. 710; in re *L. J. Doyle*, 3 B. R. 640; s. c. 1 Holmes, 61.

The requirements of the bankruptcy act are plain. When a merchant or trader is insolvent — that is, unable to pay his debts as they mature in the ordinary course of business — it is his duty to go at once into a court of bankruptcy, under the protection of the law, and submit his property to that court for adjudication and distribution; and a mode is provided by the act for bringing in his copartner who will not come in

voluntarily. An insolvent firm that allows its property to be taken by a receiver, under an order of a State court, thereby commits an act that necessarily delays and defeats the operation of the bankruptcy act. In the first place, it absolutely defeats the operation of the bankruptcy act by withdrawing the property from any administration under it. Whether some other administration, either through a receiver or a voluntary assignee, is wiser and better or not — whether the end will be the same if those modes are carried into honest and faithful execution or not — the operation of the bankruptcy act is equally defeated. For the statute does not say with intent to defeat or prevent the result which the bankruptcy law is intended ultimately to accomplish, viz.: the appropriation of the property to the payment of the debts; but it does say with intent to defeat or delay the operation of the act; and withdrawing the property from the reach of the law, and the means which it provides to secure the intended result, does effectually, in respect to that property, defeat the operation of the act. The design and purpose of the bankruptcy act are that the property of insolvents shall be secured to the creditors in the very mode pointed out thereby, with all the facilities for its appropriation, all the security for its administration, all the safeguards against fraud, all its protection against devices to establish false claims, fictitious debts, and illegal or inequitable preferences which that act provides, and in the summary manner in which the proceedings may be conducted. It is not, therefore, for the debtors, or for the debtors and some of the creditors, to say that they can devise a better or safer, or more economical mode of reaching the same final result. If it were true, it would be only saying that they will resort to an expedient to defeat the bankruptcy law, and that their reason therefor is because they think their plan is wiser and better than that which Congress has devised. In the second place, such taking of the property by a receiver delays the operation of the act, for it can not reach the property at all, as to the partnership debts; and as to individual creditors, if it should turn out that there is anything for them, they must wait the termination of the entire proceedings under the receivership before the assignee appointed for them can reach it. A proceeding which must pass through all the ordinary forms of litigation, and which is susceptible of almost indefinite protraction through orders, appeals, rehearings, etc., is substituted for the summary proceedings which the act provides. *Hardy v. Clark*, 3 B. R. 385; s. c. 1 L. T. B. 151; s. c. 3 L. T. B. 11; s. c. 17 Pitts. L. J. 61; s. c. 2 C. L. N. 121; *Hardy v. Binninger*, 4 B. R. 262; s. c. 7 Blatch. 262.

It has always been the law and practice, under the insolvent statute of Massachusetts, to consider all partial settlements by insolvents as, in themselves, acts of bankruptcy; and it is well understood that, if a single creditor stands out, no arrangement can be made except through the bankruptcy court. *In re Williams & Co.*, 3 B. R. 286; s. c. *Lowell*, 406; s. c. 2 L. T. B. 100; *in re Pierce & Holbrook*, 3 B. R. 258; s. c. 16 Pitts. L. J. 204.

The onus probandi rests upon the debtor when there have been secret preferences in a composition. It is never necessary to prove affirmatively

that a man has not assented to that which is to his disadvantage. The presumption of law is that he has not. *Curran v. Munger*, 6 B. R. 33.

The sale of goods by an insolvent debtor from his store to customers in the ordinary course of trade, at a time when he is endeavoring to compromise with his creditors, does not raise a presumption of an intent to defeat the operation of the bankruptcy act. His efforts to settle with his creditors without going through bankruptcy in court, are entirely legitimate, and not prohibited by any provision of the bankruptcy act; and continuing to sell goods in the usual way of trade pending such negotiations, is entirely proper and justifiable, and what he ought to do so long as his intentions are not fraudulent. *In re Munger & Champlin*, 4 B. R. 295.

If a solvent partner takes all the assets on the dissolution of the firm, for the purpose of selling them with the consent of the creditors, a sale so made is not an act of bankruptcy. *In re Christopher Weaver*, 9 B. R. 132.

The rights of stockholders are always subordinate to the rights of creditors, and it is difficult to see how the issue at par of the stock of the company, not before issued, in payment of the bona fide debt of the company, can operate to the prejudice of creditors, or work a fraud upon them. If, however, the stock is owned by the company as paid-up stock, it might be regarded as ordinary property, and if disposed of by the authorized act of the corporation to creditors, under circumstances to give them an illegal preference, no reason is perceived why it would not be an act for which the corporation could be proceeded against under the bankruptcy law. *Winter v. R. R. Co.*, 7 B. R. 289; s. c. 2 Dillon, 487.

Allowing property to be taken on an execution issued upon a fictitious and fraudulent judgment is an act of bankruptcy, since it delays and defeats the operation of the bankruptcy act. *In re Schick*, 1 B. R. 177; s. c. 2 Ben. 5; s. c. 1 L. T. B. 28.

It is immaterial whether the debtor had in contemplation the provisions of the bankruptcy act or not. *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *Haughey v. Albin*, 2 B. R. 399; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47. *Contra*, in *re Drummond*, 1 B. R. 231; s. c. 1 L. T. B. 7.

**Commercial Paper.**—(j) The commercial definition of a trader is one who makes it his business to buy and sell merchandise or other things ordinarily the subject of traffic and commerce. *In re Cowles*, 1 B. R. 280; s. c. 1 W. J. 367; *Love v. Love*, 21 Pitts. L. J. 101.

In order to be a trader, the person must buy as well as sell. *Hall v. Cooley*, 3 N. Y. Leg. Obs. 282; in *re Chandler*, 4 B. R. 213; s. c. Lowell, 478; s. c. 2 L. T. B. 170.

If he merely makes up the product of his own land, he is not a trader. *In re Chandler*, 4 B. R. 213; s. c. Lowell, 478; s. c. 2 L. T. B. 170; in *re Samuel King*, 1 N. Y. Leg. Obs. 276.

The keeper of a livery stable is not a trader. *Hall v. Cooley*, 3 N. Y. Leg. Obs. 282.

A sale of surplus commodities not purchased with a view to sale is not such a dealing as will render the party a trader. *Ibid*.

The occasional sale by the keeper of a livery stable of horses and carriages that have become unfit for use, is but a necessary incident to the main business of letting for hire, and does not render him a trader. *Ibid.*

The keeper of a livery stable, who only sells horses occasionally, without holding himself out as a dealer in horses, is not a trader, for this is only auxiliary to his main business. *Ibid.*

A manufacturer and vendor of sleighs, carriages, and other vehicles, is a trader. *In re Rufus Hoyt*, 1 N. Y. Leg. Obs. 132; *Wakeman v. Hoyt*, 5 Law Rep. 309.

A person who carries on the business of a distiller, and also buys cattle, which he fattens and sells, is a trader. *In re William Eeles*, 1 N. Y. Leg. Obs. 84; s. c. 5 Law Rep. 273.

If a person is engaged in a business requiring the purchase of articles to be sold again, either in the same or in an improved state, he must be regarded as "using the trade of merchandise." *In re Rufus Hoyt*, 1 N. Y. Leg. Obs. 132; *Baldwin v. Rousseau*, 1 N. Y. Leg. Obs. 391; *Wakeman v. Hoyt*, 5 Law Rep. 309.

When a person sells the mere produce of his own labor, he is only a seller and not a trader. *In re Rufus Hoyt*, 1 N. Y. Leg. Obs. 132; *Wakeman v. Hoyt*, 5 Law Rep. 309.

A person who owns and leases oil lands, and receives a part of the products as rent, is not a trader as respects his dealings in the products of his lands in a crude state. The word "trader" is to be interpreted according to its meaning in the English bankruptcy law, and when the interpretation of the word in this respect was established, lands were not liable to be sold for the owner's debts, and the products of land were not considered the subjects of trade. The intervention of a factor, and the commercial disposal of the products by him, and the accommodations which he may have extended as a banker will not in such a case make the principal a trader. *In re Thomas Woods*, 7 B. R. 126; s. c. 29 Leg. Int. 236; s. c. 20 Pitts. L. J. 21.

The publishers of a newspaper, who also conduct a book and job printing office connected therewith, are manufacturers. *In re Kenyon & Fenton*, 6 B. R. 238; s. c. 1 Utah Ter. 47.

The printing and publishing of a daily newspaper is manufacturing in the strict sense of the law. A newspaper publication is as much the result of manufacture as that of books or cards or billheads. *Ibid.*

A person who works up lumber is a manufacturer. The fact that he buys the land as well as the material does not appear to be material. It is not like the case of a farmer making cider or cheese. These products, when made by the farmer, exclusively from his own farm, are not usually made on so large a scale as to be called a manufacture, as the word is now commonly used; and the making is merely incidental to the cultivation of his land. But in the case of lumber, the land may be almost said to be incidental to the lumber, which usually forms its chief value, and the manufacture itself is the main source of profit, independently of any cultivation or other use of the land. *In re Chandler*, 4 B. R. 213; s. c. Lowell. 478; s. c. 2 L. T. B. 170; *Hall v. Cooley*, 3 N. Y. Leg. Obs. 282.

The powers of a corporation must be determined by its charter. A corporation is an artificial person, the creature of law. It has no powers except what are given by its incorporating act, either expressly or as incidental to its existence and express powers. The mere power does not make the company a manufacturer unless it actually engages in the business of manufacturing. The business must also be carried on for the purpose of selling the products manufactured, and not for the exclusive use of the company, to make it a manufacturer within the meaning of the bankruptcy law. *Ala. & Chat. R. R. Co. v. Jones*, 5 B. R. 97.

The involuntary feature of the bankruptcy law is punitive in its character and effect, and as such should only be applied to those who do some act forbidden by the law, or who failed to do some act required by it. It is not the contracting the debt only that constitutes the act of bankruptcy, but it is something that is done, or neglected to be done afterward, and contemplates the power in each individual to refrain from doing the thing forbidden, or having the power to do the thing required. This every partner is presumed to possess, but one who has only lent his credit to the firm by holding himself out as a partner, and thereby liable to those who gave credit on that account, having no interest in the business and having no voice in the control over its affairs, has not such power, and is not, therefore, subject to be declared a bankrupt for an act of bankruptcy committed by the firm. *Moore v. Walton*, 9 B. R. 402.

A loan of money to be used in business under an agreement whereby the lender reserves the option to share in the profits if the business is successful, or, if not successful, then to receive back the amount advanced with interest, does not make the parties partners inter se without an election to share in the profits. *Ibid.*

Any person who has fraudulently stopped payment of his debts generally may be adjudicated a bankrupt. *In re Joseph S. Hadley*, 12 B. R. 368.

What will constitute a stoppage of payment is usually easy to determine. The closing of the doors of a banking-house, a general assignment for the benefit of creditors or any other act which in common parlance is termed a failure is evidence of such stoppage. *Ibid.*

The provision in relation to commercial paper embraces two cases: the one of an original fraudulent stoppage of payment, in which proceedings may be instituted at once; and the other of a suspension of payment not fraudulent, and not per se an act of bankruptcy, but which, if continued for more than forty days, becomes an act of bankruptcy by its continuance. Congress seems to have taken up the whole subject of the stoppage of payment of debts as an act of bankruptcy, and enacted that banks, bankers, brokers, merchants, traders, manufacturers, and miners shall, if they fraudulently stop payment of their debts, be liable to be adjudged bankrupts at once, and if they stop or suspend payment of their commercial paper, and do not resume payment of it within a period of forty days, they shall then be liable to be adjudged bankrupts. *Wells et al. (ex parte H. B. Claflin & Co.)*, 1 B. R. 171; s. c. 1 L. T. B. 20; s. c. 7 A. L. Reg. 163; *in re Weikert et al.*, 3 B. R. 27; s. c. 1 Ben. 397; *in re Thomp-*

son & McClallen, 3 B. R. 185; s. c. 2 Biss. 166; s. c. 1 L. T. B. 137; in re Cowles, 1 B. R. 280; s. c. 1 W. J. 367; in re Schoo, 3 B. R. 215; Baldwin v. Wilder, 6 B. R. 85; in re Burt, 1 Dillon, 439; in re Hall, 1 Dillon, 586; in re Hercules Ins. Co., 6 B. R. 338; s. c. 6 Ben. 35; s. c. 5 L. T. B. 400; Mendenhall v. Carter, 7 B. R. 320; Winter v. R. R. Co., 7 B. R. 289; s. c. 1 Dillon, 487; in re Valliquette, 4 B. R. 307; in re B. Cohn, 7 B. R. 31; s. c. 5 C. L. N. 14; s. c. 29 Leg. Int. 309.

The words "stopped or suspended" are sometimes used to denote not only the act of stopping, but also the not resuming payment, and if they were the only words used in the statute they would express both ideas. If the debtor stopped payment before the passage of the statute, the subsequent nonresumption of payment of his commercial paper does not constitute an act of bankruptcy. The words "stopped" and "not resumed" have distinct significations. There can not be a condition of nonresumption without a previous stopping of payment, but the words, as used, have a different relation as to time in the transaction. A fraudulent stopping of payment is an immediate act of bankruptcy, and no subsequent resumption will free the fraudulent debtor from an adjudication of bankruptcy, if proceedings are commenced within six months. In this clause of the statute the word "stopped" refers to the time of the immediate act, and the question of nonresumption does not arise, and the words "not resumed" are not used. In the subsequent clause, where a stopping of payment which is not fraudulent is provided for, the words "stopped" and "not resumed" are both used, one with reference to the time when the paper was dishonored, and the other with reference to the forty days of grace allowed by the bankruptcy law. In this case stopping is an inchoate act of bankruptcy, which is completed by a failure to make payment for forty days. *Mendenhall v. Carter*, 7 B. R. 320.

The nonpayment of commercial paper at maturity, and the continued suspension and neglect of payment, are a continuous act of bankruptcy. The debtor, in such case, is in a state of suspension and nonresumption of payment. His duty to pay is just as definite on any day after the day on which his commercial paper is by its terms payable, as it is on that day, and on any such day he is in the very position, as between him and the creditors, of neglecting his duty, suspending, keeping in suspense, and not resuming payment. Whether his continued suspension and nonresumption of payment be termed a continuous act of bankruptcy, or be regarded as daily successive acts of bankruptcy, is not material. So long as it continues, the creditors may avail themselves of it as an act of bankruptcy, committed as truly within the preceding six months as on the day on which the debtor first violated his commercial obligation. In re Jacob Raynor, 7 B. R. 527; s. c. 11 Blatch. 43; Baldwin v. Wilder, 6 B. R. 85. Contra, *Mendenhall v. Carter*, 7 B. R. 320.

An express authority is not in general indispensable to confer upon a corporation the right to borrow money or to become a party to negotiable paper. A corporation, in order to attain its legitimate objects, may deal precisely as an individual may who seeks to accomplish the same ends, and this includes the power to borrow money for use in its legitimate busi-

ness, and the power to give a time engagement to pay the debt in any form not prohibited by statute. In *re Hercules Ins. Co.*, 6 B. R. 338; s. c. 6 Ben. 35; s. c. 5 L. T. B. 400.

The term commercial paper is used in the bankruptcy act to denote bills of exchange, promissory notes, and negotiable bank checks — paper governed by those rules which have their origin in and are established upon the custom of merchants in their commercial transactions known as the law merchant. Such paper is usually denominated commercial paper, and it should be presumed that Congress used the term in its common acceptation rather than in a more restricted sense. In *re Nickodemus*, 3 B. R. 230; s. c. 1 L. T. B. 140; s. c. 2 C. L. N. 49; s. c. 16 Pitts. L. J. 233; in *re Hollis et al.*, 3 B. R. 310; in *re Chandler*, 4 B. R. 213; s. c. Lowell, 478; s. c. 2 L. T. B. 170; in *re R. Stevens*, 5 B. R. 112; s. c. 1 Saw. 397; in *re Carter*, 6 B. R. 290; s. c. 3 Bliss. 195; in *re Kenyon & Fenton*, 6 B. R. 238; in *re Hercules Ins. Co.*, 6 B. R. 338; s. c. 6 Ben. 35; s. c. 5 L. T. B. 400; in *re James W. Sykes*, 5 Bliss. 113. Vide in *re Lowenstein et al.*, 2 B. R. 306; in *re McDermott Patent Bolt Manuf. Co.*, 3 B. R. 128; s. c. 3 Ben. 360; in *re Clemens*, 8 B. R. 279; s. c. 9 B. R. 57; s. c. 2 Dillon, 534.

Negotiable paper stands, by usage and by statute, upon the custom of merchants, and is controlled and regulated by such custom; and these regulations are always treated as part of the law merchant. In saying that any person belonging to one of certain designated classes should be deemed a bankrupt if he failed to pay his commercial paper, Congress simply referred to a well known and very exclusive test of insolvency. If a trader allows his paper to go to protest, he is said to have failed or suspended. The expressions are used as equivalent. It is like the closing of the counting-room and denying one's self to creditors according to the old English law, and it will be observed that, while Congress has not thought fit to say that every insolvent person may be made bankrupt against his will, yet any one who has shown by certain conclusive acts or neglects, like avoiding process, being imprisoned, and suffering his paper to remain dishonored, that he can not hope to pay his debts, may be proceeded against. In *re Chandler*, 4 B. R. 213; s. c. Lowell, 478; s. c. 2 L. T. B. 170.

A note given merely as a voucher or memorandum in exchange for a note of like amount, simultaneously given by the petitioner to the debtor, though in form negotiable, can not in any proper sense be called the commercial paper of the maker as between him and the petitioner. In *re Charles S. Westcott et al.*, 7 B. R. 285; s. c. 6 Ben. 135.

Although Confederate currency was the only medium of exchange at the time of the execution of a note, yet it is commercial paper if it is payable in money. *Mendenhall v. Carter*, 7 B. R. 320.

When the *lex loci contractus* places notes on the same footing as inland bills of exchange, a note is commercial paper. In the absence of evidence to the contrary, the presumption is that it was executed at the place where it is dated. In *re Shea et al.*, 3 B. R. 187; s. c. 2 Bliss. 156; s. c. 1 L. T. B. 107; in *re Nickodemus*, 3 B. R. 230; s. c. 1 L. T. B. 140; s. c. 2

C. L. N. 49; s. c. 16 Pitts. L. J. 233; in re Carter, 6 B. R. 299; s. c. 3 Biss. 195; Mendenhall v. Carter, 7 B. R. 320.

The fact that a manufacturing firm has been dissolved by the death of one of the partners, and the survivor is engaged in settling its affairs, and closing up its business at the time of giving the draft does not divest the latter of his character of manufacturer, especially when the debt which forms the consideration of the draft is a debt contracted by the firm in the course of its manufacturing business. In re R. Stevens, 5 B. R. 112; s. c. 1 Saw. 397.

The bonds and coupons of a railroad corporation are not commercial paper. Tucker v. Opelousas & Great Western R. R. Co., 3 B. R. (quarto) 31.

Interest coupons severed from the bonds are commercial paper when issued by a railroad corporation. In re Greenville & Col. R. R. Co., 5 C. L. N. 124; s. c. 6 A. L. J. 422.

A note given by one partner upon the dissolution of the firm on final settlement at the close of mercantile business, is not commercial paper. In re Christopher Weaver, 9 B. R. 132.

An accommodation note which is indorsed by the payee, but taken up by the maker within forty days after the suspension of its payment, is not an act of bankruptcy on the part of the payee. In re Massachusetts Brick Co., 6 B. R. 408; s. c. 4 L. T. B. 220.

A retiring partner who authorizes his former partners to use his name in their business, is responsible as a partner in respect to a note given by them, and must answer to all who rely upon the firm name, whether old customers or not. In re Krueger et al., 5 B. R. 439.

A judgment note is not commercial paper. Love v. Love, 21 Pitts. L. J. 101.

To be the debtor's commercial paper, the debt which the paper represents must have been incurred by the debtor in his character of bank, banker, broker, merchant or trader, manufacturer or miner. This being so, it matters not whether the note, bill, or check was given for a loan of money, for goods purchased, or otherwise; nor whether the debtor is liable thereon as maker, acceptor, or indorser — whether as principal debtor or otherwise. It must be commercial paper, and the debtor must be a party thereto with a fixed liability; and it must be a debt incurred in his character of banker, merchant or trader. In re Nickodemus, 3 B. R. 239; s. c. 1 L. T. B. 110; s. c. 2 C. L. N. 49; s. c. 16 Pitts. L. J. 233; in re James W. Sykes, 5 Biss. 113.

The accommodation indorsement of the note of another does not make it within the meaning of this clause the commercial paper of the accommodation indorser. In re Clemens, 8 B. R. 279; s. c. 9 B. R. 57; s. c. 2 Dillon. 534; in re Nickodemus, 3 B. R. 239; s. c. 1 L. T. B. 110; s. c. 2 C. L. N. 49; s. c. 16 Pitts. L. J. 233; Innes v. Carpenter, 4 B. R. 412. Contra, in re Chandler, 4 B. R. 213; s. c. Lowell. 478; s. c. 2 L. T. B. 170.

A person who had ceased to be a trader at the time when he gave the note does not commit an act of bankruptcy by suspending payment thereof, although the debt for which the note was given was contracted



while he was a trader. The language of the section clearly indicates that the making of the note must have been done while the party was a trader. *In re Francis M. Jack*, 13 B. R. 296; s. c. 1 Woods, 540.

A note given by one partner, on a settlement of a partnership business as manufacturers, to pay for the interest of the copartner in the business, and to settle the balance appearing against him, is not the commercial paper of a manufacturer issued in the course of his business as such. *In re George Lang*, 14 B. R. 159.

It is not necessary that the nonpayment for the given period shall be general. The statute has not declared that suspension of payment on any particular number of notes or bills of exchange shall constitute an act of bankruptcy, but the language is "his commercial paper." *In re Guy Wilson*, 8 B. R. 396; s. c. 5 Bliss. 387; *McLean v. Brown, Weber & Co.*, 4 B. R. 585; s. c. 2 L. T. B. 169.

An allegation of the suspension of one piece of commercial paper makes out a *prima facie* case, and is sufficient. If there is any legal reason for the nonpayment, it is for the debtor to show it before the court. The petitioner need not, therefore, set forth by negative allegations all the particular circumstances which by possibility might show the nonpayment to be within the meaning of the law. It is sufficient that a *prima facie* case is made upon the petition. *In re Guy Wilson*, 8 B. R. 396; s. c. 5 Bliss. 387; *in re Moses A. McNaughton*, 8 B. R. 44.

If a man declines to pay solely because he is not liable to pay, or because he has a valid claim against the paper, or a set-off, that is not a stoppage or suspension within the meaning of the bankruptcy act. *In re Thompson & McClallen*, 3 B. R. 185; s. c. 2 Bliss. 166; s. c. 1 L. T. B. 137; *in re Chandler*, 4 B. R. 213; s. c. Lowell, 478; s. c. 2 L. T. B. 170; *Bank v. Iron Co.*, 5 B. R. 491; s. c. 1 L. T. B. 272; s. c. 19 Pitts. L. J. 5; s. c. 3 C. L. N. 402; s. c. 8 Phila. 171; *in re Charles S. Westcott*, 7 B. R. 285; s. c. 6 Ben. 135; *in re Mannheim*, 7 B. R. 342; s. c. 6 Ben. 270; s. c. 6 L. T. B. 94; *in re James W. Sykes*, 5 Bliss. 113.

The court of bankruptcy will not sit to try the validity of the reasons for the nonpayment of the note or bill. It is not a court for the mere collection of debts, and each case must be considered by itself in connection with the circumstances surrounding it. The nonpayment of one piece of paper is not of itself suspension, for there may be a good reason for it. But when he fails to pay for want of means, and continues unable to pay, he has suspended within the meaning of the act, although but a single check is shown to have laid over unpaid for forty days. *McLean v. Brown, Weber & Co.*, 4 B. R. 585; s. c. 2 L. T. B. 169; *in re Hercules Ins. Co.*, 6 B. R. 338; s. c. 6 Ben. 35; s. c. 5 L. T. B. 400.

The clause ought not to be used to enable a creditor to collect an ordinary debt on commercial paper, where the circumstances show that, although the paper is not paid though due, there has been no stoppage or suspension of payment of the commercial paper of the debtor within the meaning of the clause. In such case, the ordinary remedy furnished through a suit to collect the paper is all that the creditor is entitled to. The court, however, must guard against being imposed upon by a denial

of liability which is altogether a sham, and not made in good faith. The denial of liability may, nevertheless, be founded on reasons which are not valid, and which would fail in a direct action on the paper, and yet be made in good faith, in such wise that the nonpayment can not be regarded as a stoppage or suspension within the act. In *re Hercules Ins. Co.*, 6 B. R. 338; s. c. 6 Ben. 35; s. c. 5 L. T. B. 400.

It is not sufficient to defeat the operation of the bankruptcy law to simply deny liability upon the commercial paper. The party must satisfy the court that he has good reasons for disputing his liability, and that his liability is involved in doubt, at least, before a bankruptcy court will refuse to proceed. In *re Munn*, 7 B. R. 468; s. c. 3 Biss. 442; in *re James W. Sykes*, 5 Biss. 113.

It is not enough for a debtor to show as a reason why a decree in bankruptcy should not go against him that he is insolvent, and because of spite, or caprice, or some other similar cause he does not choose to pay his commercial paper. The reason which alone can prevent the nonpayment of commercial paper, and its continuance for forty days from constituting an act of bankruptcy must be a legal reason, such as to enable the court to say that it is not within the scope and meaning of the bankruptcy law. In *re Guy Wilson*, 8 B. R. 396; s. c. 5 Biss. 387.

It is enough that the alleged debtor could and did honestly entertain the belief that he was not legally bound to pay the paper till it should be so adjudged. Such a case is not one for an adjudication of bankruptcy, but for a suit on the paper in a proper tribunal. In *re Charles S. Westcott*, 7 B. R. 285; s. c. 6 Ben. 135; in *re Hercules Ins. Co.*, 6 B. R. 338; s. c. 6 Ben. 35; s. c. 5 L. T. B. 400; in *re Mannheim*, 7 B. R. 342; s. c. 6 Ben. 270; s. c. 6 L. T. B. 94.

The refusal to pay commercial paper on the ground that it is tainted with usury, and that the full sum named therein is not for this reason due, is not an act of bankruptcy. In *re Staplin*, 9 B. R. 142.

A suspension which has taken place on account of an injunction against the debtor, restraining him from making any transfer or disposition of his property, is not an act of bankruptcy. In *re Edward D. Pratt*, 9 B. R. 47; s. c. 6 Ben. 165.

The fact that a State court has obtained jurisdiction of the property and assets of the debtor, under an assignment for the benefit of creditors, does not prevent the bankruptcy court from entertaining a proceeding against the debtor. In *re P. Laner*, 9 B. R. 494.

The suspension continues, although the debtor makes an assignment for the benefit of the creditors before the expiration of the forty days, and when the time expires is a complete act of bankruptcy. *Ibid.*

Evidence that the debtor is a man of means, and has met his other paper as it became due, may tend to rebut the presumption of insolvency, and to show that the failure to pay the note was from other causes not making him amenable to the bankruptcy act. In *re James W. Sykes*, 5 Biss. 113.

The suspension of payment of commercial paper for forty days is an act of bankruptcy of which any creditor may avail himself. The act of

suspension raises a presumption of insolvency, and makes the party guilty thereof a proper subject for proceedings in bankruptcy. This act of bankruptcy is not condoned or defeated by the mere payment of the suspended paper, so as to prevent any other creditor from availing himself thereof. It is not enough that the debtor shall pay his suspended paper alone. He must pay or settle all his debts, and satisfy all his creditors, if he would wipe out the offense against his commercial standing committed by the suspension. In *re Ess & Clarendon*, 7 B. R. 133; s. c. 3 Biss. 301.

The dissolution of a partnership, and the assumption of the partnership debts by one partner, does not make any difference with the duty and liability of the retired partner to meet the partnership paper. He should pay the debt, and look to his late partner for reimbursement. In *re Welkert et al.*, 3 B. R. 27; s. c. 1 Ben. 397.

It is no defense that the debtor was not a banker, merchant, or trader at the time of suspension. If the maker of the paper was a banker, merchant, or trader at the time of its execution, he becomes liable to meet it in the time specified by the law, no matter what his occupation may then be. *Davis & Green v. Armstrong*, 3 B. R. 34; s. c. 2 L. T. B. 138; *Baldwin v. Rosseau*, 1 N. Y. Leg. Obs. 391; *Everett v. Derby*, 5 Law Rep. 225.

When a man enters the commercial community as a merchant, trader, banker, or otherwise, he assumes all the responsibilities which attach to his calling. One of these is the obligation to take care of all his commercial paper, whether made before or after he commenced business. Consequently he may be declared a bankrupt for suspending the payment of commercial paper issued by him prior to the time of entering such business. In *re Carter*, 6 B. R. 299; s. c. 3 Biss. 195.

The principle upon which the liability as secret partner rests is essentially different from that of a known or open partner, whose name appears in the business. A secret partner is liable, not because credit is supposed to have been given to the firm by reason of his connection with it, but because he is one of the contracting parties, and benefited by the profits of the contract; so that, in order to charge a secret partner for debts contracted in the name of the firm of which he is a dormant partner, it is necessary to show that such debts were contracted in the name and business of the firm, or that the secret partner had an interest in the contract or profits. In *re Munn*, 7 B. R. 468; s. c. 3 Biss. 442.

Suspension and nonresumption, during the pendency of negotiation for extensions and renewals with all the creditors, do not constitute an act of bankruptcy. *Doan v. Compton & Doan*, 2 B. R. 607.

An allegation of stoppage and suspension on a certain day, upon commercial paper which was made and dated within the six months next preceding the actual filing of the petition, connected with the allegation that payment of the commercial paper, which consisted of a due-bill, payable on demand, had been demanded at different times, and that the debtor had failed to make payment, is equivalent to an allegation of demand on that day. In *re Chappel*, 4 B. R. 540.

The petition should state, as nearly as possible, the date of the promissory note or bill of exchange, to whom made, and for what amount, and when payable, and whether the debtor was liable thereon as maker or indorser, and by whom the same was held when payment was neglected or refused. In *re Randall & Sunderland*, 3 B. R. 18; s. c. 1 Deady, 557; s. c. 2 L. T. B. 69; *Orem & Son v. Harley*, 3 B. R. 263.

If the forty days have not expired at the time of the filing of the petition, the suspension can not be relied on to support it, although the forty days elapse before the hearing. In *re Tivoli Brewing Co.*, 11 B. R. 470.

When fraud is averred, the petition should set forth the acts that make the suspension and nonresumption fraudulent. *Gillies v. Cone*, 2 B. R. 21; s. c. 2 Ben. 502.

If the allegation sufficiently describes the paper to identify it and prevent the party from being misled, it need not give the date thereof. In *re Joseph S. Hadley*, 12 B. R. 366.

An allegation that the paper was the commercial paper of the debtor, and made by him as a merchant, etc., need not be averred except in general language. *Ibid.*

It is not necessary that the facts constituting the fraud in the suspension of the paper shall be set forth in the petition. *Ibid.*

A fraudulent stopping of payment is not an act heretofore known or defined, and it is not easy of definition. As to fraud, a mere oversight, or a vis major, or a fraud practiced upon the debtor himself, or an honest defense to the particular paper refused — if these reasons, or such as these, occasion the refusal to pay — would take the case out of the statute. And this would be so though the word fraudulently were omitted from the statute, because such an accident or refusal could not fairly be called a stopping of payment. Fraudulently means knowingly, and without just excuse applicable to the paper itself. In *re Hollis et al.*, 3 B. R. 310; *Bank v. Iron Co.*, 5 B. R. 491; s. c. 1 L. T. B. 272; s. c. 3 C. L. N. 492; s. c. 19 Lits. L. J. 5; s. c. 8 Phila. 171.

Something must be shown from which the court can draw the conclusion that the stoppage or suspension of payment of the paper was fraudulent. The mere nonpayment does not warrant such conclusion. It is for the creditor to show that the stoppage, or suspension, was fraudulent. That is not shown by proving nothing but stoppage, or suspension, and such proof alone does not even make out a prima facie case of fraud. There may be many reasons for stoppage falling short of fraud. In *re John Davis*, 3 B. R. 339; s. c. 3 Ben. 482.

When a merchant engages in business, and purchases his stock, or any part thereof, on credit, there is an implied promise that the proceeds of its sale shall be applied to the payment of such debts. The merchant commits a fraud upon his creditors if he appropriates the proceeds to any other purpose until the obligation is discharged; indeed, his whole capital stock is virtually pledged for the payment of such commercial liabilities as he may incur in such business; he is further pledged to give to his business his best skill and attention; and a failure to comply with these requisites is a fraud on the rights of those who have given him credit

in his business, and whose demands remain unsatisfied. *Davis & Green v. Armstrong*, 3 B. R. 34; s. c. 2 L. T. B. 138.

A solvent debtor, who has the means wherewith to pay commercial paper, and does not pay it, is guilty of fraud. In *re Lowenstein et al.*, 2 B. R. 306; *Hardy v. Binniger*, 4 B. R. 262; s. c. 7 Blatch. 262.

Suspension and nonresumption, with the assent of the holder of the suspended paper, is not fraudulent. In *re Lowenstein et al.*, 2 B. R. 306.

In the following cases it was held, prior to the amendment, that suspension and nonresumption were prima facie evidence of fraud. In *re Jersey City Window Glass Co.*, 1 B. R. 426; s. c. 1 L. T. B. 61; s. c. 7 A. L. Reg. 419; in *re Ballard & Parsons*, 2 B. R. 250; in *re Lowenstein et al.*, 2 B. R. 306; *Doan v. Compton & Doan*, 2 B. R. 607; *Davis & Green v. Armstrong*, 3 B. R. 34; s. c. 2 L. T. B. 138; in *re Shea et al.*, 3 B. R. 187; s. c. 2 Biss. 156; s. c. 2 L. T. B. 107; in *re Hollis et al.*, 3 B. R. 310.

In the following cases it was held that mere suspension and nonresumption were not sufficient, but that fraud must be proved. In *re Leeds*, 1 B. R. 521; s. c. 1 L. T. B. 78; s. c. 7 A. L. Reg. 693; *Gillies v. Cone*, 2 B. R. 21; s. c. 2 Ben. 502; in *re John Davis*, 3 B. R. 339; s. c. 3 Ben. 482.

A creditor whose claim is not evidenced by commercial paper, but rests in open account, may file a petition against his debtor, and charge that he has suspended and failed to resume payment of his commercial paper for the prescribed period. In *re Hall*, 1 Dillon, 586; in *re Ess & Clarendon*, 7 B. R. 133; s. c. 3 Biss. 301.

**The Involuntary Petition.**—(k) Proceedings in bankruptcy can not be initiated in the circuit court. For that purpose the jurisdiction of the district court is plainly exclusive. In *re Binniger et al.*, 3 B. R. 487; s. c. 7 Blatch. 159; s. c. 1 L. T. B. 183.

This section does not designate the district judge to whom the petition of the creditor shall be addressed. It seems not only reasonable, but most in accordance with other provisions of the act, to hold that proceedings against a debtor, to procure an adjudication of involuntary bankruptcy, are, like those instituted by himself to obtain adjudication of voluntary bankruptcy, to be had in the court of the district in which he has resided or carried on business for the preceding six months, or for the longest period thereof. The assent of the debtor to the proceeding will not make it valid, for consent can not give jurisdiction. The petition must be addressed to the court authorized by law to take cognizance of the case, and to none other. In *re Fogerty & Gerrity*, 4 B. R. 451; s. c. 1 Saw. 233; s. c. 2 L. T. B. 174; in *re Ala. & Chat. R. R. Co.*, 6 B. R. 107; s. c. 9 Blatch. 391; s. c. 5 L. T. B. 76.

The petition can not be filed in the district where the debtor neither resides nor carries on business. In *re J. M. Palmer*, 1 B. R. 213; in *re Fogerty & Gerrity*, 4 B. R. 451; s. c. 1 Saw. 233; s. c. 2 L. T. B. 174.

The restrictions in section 5014 as to the judge to whom the petition is to be addressed apply to proceedings under this section. The debtor can not be adjudged a bankrupt in a district in which he has not resided for the longest period of the six months next immediately preceding the filing of the petition. In *re Leighton*, 5 B. R. 95.

Proceedings in bankruptcy should be instituted with reference to the actual residence of the party, or his place of business, and not with reference to his domicile. If a party has actually resided in one State during the greater part of the six months next immediately preceding the filing of the petition, the petition must be filed in the district court for that State, although his family may have resided in another State during the whole period. *In re Watson*, 4 B. R. 613.

The district court of any district in which the debtor may actually reside and do business at the time of the filing of the petition against him has jurisdiction to hear the cause and make an adjudication of bankruptcy. *In re Johnson*, 1 Cent. L. J. 223.

If the name of the judge is given, it must be correct. A petition misnaming the judge can not be filed. *Anon.*, 3 B. R. 128.

The petition should name facts with certainty and detail, so as to inform the debtor of what he must meet and resist. The various statements of acts of bankruptcy, given in Form No. 54, are mere outlines or skeleton statements, to be filled in with the particular circumstances of each case, and such is the direction given in the *nota bene* near the end. *In re Randall & Sunderland*, 3 B. R. 18; s. c. 1 Deady, 557; s. c. 2 L. T. B. 69.

The allegations of the petition must be positive and unqualified. There is nothing in the act, or in the rules and forms, or the nature of the proceedings which requires that the allegations, either as to the debt, or as to the act of bankruptcy, should be made on the personal knowledge of the petitioner. The petition must be made by the creditor, and in most instances can be made upon information and belief alone. In addition to the petition, there must be a deposition to the debt, and to the act of bankruptcy. In these it may be proper that the witness should speak from his own knowledge, or at least disclose the grounds of his belief or the sources of his information. Much will depend upon the circumstances of the particular case. *In re Muller & Brentano*, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33; *Orem & Son v. Harley*, 3 B. R. 263.

A petition to have a partnership declared bankrupt must set forth acts of bankruptcy on the part of the partnership. An averment of an act of bankruptcy on the part of one of the members is not sufficient. *In re Waite & Crocker*, 1 B. R. 373; s. c. Lowell, 207; *in re Redmond & Martin*, 9 B. R. 408.

A petition against partners must allege that the act of bankruptcy was committed during the continuance of the partnership. *In re Hill & Van Valkenburgh*, 5 Law Rep. 326.

A fraudulent dissolution and transfer of the firm property to one partner is the act of all the partners. *In re J. A. & H. W. Shouse*, Crabbe, 482.

When a transfer of property is charged as an act of bankruptcy against a firm, the petition should distinctly allege that the property transferred belonged to the firm. *In re Williams & Co.*, 3 B. R. 286; s. c. Lowell, 406; s. c. 2 L. T. B. 100.

A transfer of firm property by one member of the firm, without the privity or consent of his co-partners, is an act of bankruptcy on the part of this firm when accompanied by the other conditions prescribed by the

act. In *re Black & Secor*, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39; *Fisher v. Currier*, 5 Law Rep. 217; s. c. 1 Penn. L. J. 217.

In order to render a party liable on the ground that he has been held out as partner, he must have had no notice of his being so held out or there must be circumstances from which notice can be presumed. In *re S. A. Jewett*, 15 B. R. 126; s. c. 16 B. R. 48; s. c. 9 C. L. N. 345.

When a party permits another to hold him out as partner and thereby procure credit on the strength of his supposed relation, neither community of interest nor participation in the profits is necessary to render him liable as partner. *Ibid.*

It is never good pleading to make averments in the alternative. When two distinct matters, each of which contains a good cause of action or defense, are alleged conjunctively, it is enough that either of them be satisfactorily proved. In *re Drummond*, 1 B. R. 231; s. c. 1 L. T. B. 7; *Irving v. Hughes*, 2 B. R. 62; s. c. 7 A. L. Reg. 200; s. c. 6 Phila. 451.

Where one of the alternatives will support the pleadings and the other not, the construction will be against the pleading, and it will be held bad on demurrer. In *re Redmond & Martin*, 9 B. R. 408.

Where it is immaterial which one of the alternatives is true, a pleading in the alternative will not be held bad on demurrer. *Ibid.*

It is not necessary in the first instance for a petitioning creditor to show that there are other creditors. Ordinarily, bankruptcy proceedings may be instituted and maintained where there are no other creditors. If, however, that fact becomes material in any case, the burden is on the debtor to show it. In *re Daniel Sheehan*, 8 B. R. 345.

A careful pleader in stating the nature of the demand will allege that the obligation was contracted by the alleged debtor; but where the demand has already been averred to be against the alleged debtor, an omission to so charge in the description of the claim will not render the petition bad on demurrer. In *re Redmond & Martin*, 9 B. R. 408. *Vide* in *re J. A. & H. W. Shouse*, *Crabbe*, 482.

The demand need not be stated in detail, but it should be so far stated that the court may see that it is a provable debt. In *re Joseph S. Hadley*, 12 B. R. 368.

An allegation which does not show that the debt is due to the petitioning creditor is not sufficient. In *re Western S. & T. Co.*, 13 Pac. L. R. 66.

The allegation must show that the creditor was still a creditor at the time of the filing of the petition. *Ibid.*

The petition must affirmatively show that the requisite number of creditors in number and amount have united therein. This allegation need not necessarily be so positive that the party can be prosecuted for perjury on it, but it may be stated on information and belief. In *re J. Young Scammon*, 10 B. R. 66; s. c. 6 Biss. 130; in *re Joliet Iron & Steel Co.*, 10 B. R. 60; s. c. 1 A. L. T. (N. S.) 372; s. c. 10 A. L. J. 29; s. c. 6 C. L. N. 328; s. c. 21 Pitts. L. J. 207; in *re Isaac Scull*, 10 B. R. 165; s. c. 7 Ben. 371; s. c. 1 A. L. T. (N. S.) 416; *Warren Savings Bank v. Palmer*, 10 B. R. 239; s. c. 6 C. L. N. 366; s. c. 31 Leg. Int. 261; s. c. 8 Pac. L. R. 44;

21 Pitts. L. J. 193; in re James R. Keeler, 10 B. R. 419; s. c. 20 I. R. R. 82; s. c. 1 A. L. T. (N. S.) 422.

An allegation upon belief without charging either information or knowledge that the petitioners constitute the requisite proportion of creditors is sufficient. In re Henry A. Mann, 14 B. R. 572; s. c. 13 Blatch. 401; s. c. 51 How. Pr. 174.

The requirement of the statute is not met by an allegation that the petitioners constitute the requisite proportion of the creditors when two of them hold claims for less than \$250. In re James A. McKibben, 12 B. R. 97.

An allegation that the petitioners constitute at least one-fourth in number of the creditors of the debtor, and that the aggregate of their debts provable under the act amounts to at least one-third of the debts so provable, is sufficient although some of the claims are under \$250. In re Robert L. Hall, 15 B. R. 31.

It is not necessary to amend the petition when there has been an adjudication before the amended act took effect. The judgment of adjudication based upon a petition conforming to the provisions of the law in force when made is valid, and as binding upon the debtor as if the amended act had not been passed. The adjudication removes the case beyond the domain of legislative control. In re Jacob Raffauf, 10 B. R. 69; s. c. 6 Biss. 150; in re Frederick E. Angell, 10 B. R. 73; s. c. 31 Leg. Int. 254; s. c. 21 Pitts. L. J. 206; s. c. 6 C. L. N. 341; s. c. 1 Cent. L. J. 363; in re H. & M. Rosenthal, 10 B. R. 191; s. c. 31 Leg. Int. 254; s. c. 6 C. L. N. 342; in re Obear, 10 B. R. 151; s. c. 3 Dillon, 37; in re C. B. Comstock & Co., 10 B. R. 451; s. c. 3 Saw. 128; Barnett v. Hightower, 10 B. R. 157; in re Wm. J. Pickering, 10 B. R. 208; s. c. 1 Cent. L. J. 371.

An adjudication made on the 22d day of June, 1874, may be set aside if the proper proportion of creditors did not join in the petition. In re Carrier & Baum, 13 B. R. 208.

If an adjudication has been made upon a petition not signed by a sufficient number of creditors, the court, upon the filing of a petition signed by the requisite proportion of creditors praying for a confirmation of the proceedings, may make a new adjudication. In re Wm. N. Taylor & Co., 1 W. N. 16.

**The Verification.**—If there are five or less signers, all must verify the petition by oath; but if there are more than five signers it is sufficient if the first five of them so verify it. This necessarily implies that there may be more signers than those who verify the petition by oath, and also that those who are petitioners must sign the petition. In re Isaac Scull, 10 B. R. 165; s. c. 7 Ben. 371; s. c. 1 A. L. T. (N. S.) 416.

Where several petitioners join in the petition in the same right, a verification by one is sufficient. But the case of petitioners joining in separate and distinct rights is different, and it is necessary that there should be a verification by or on behalf of every petitioner. In re Solomon Simmons, 10 B. R. 253; s. c. 1 Cent. L. J. 449.

The petition may be signed in the name of the firm and verified by a member of the firm. In re Morris, 11 B. R. 413.



When an agent is clothed with full authority, and is able to present the proper authentication of the petition required by the forms, the petition should be entertained, although the petitioning creditor does not in person sign or swear to the petition. The act does not in terms say that the petition shall be signed or verified at all. It should be construed as similar language is in the whole field of legislation, and in the terminology of courts; and there the maxim, "qui facit per alium, facit per se," is of almost universal application. The blanks in the forms may be filled by the name of the attorney or agent of the petitioner, or with the name of the petitioner, "by A. B., his attorney and agent." In *re Jacob Raynor*, 7 B. R. 527; s. c. 11 Blatch. 43. *Contra*, *Hunt v. Pooke*, 5 B. R. 161; in *re D. O. Butterfield*, 6 B. R. 257.

No officer of a corporation has authority, by virtue of his office, to sign and verify a petition for adjudication of bankruptcy against a debtor of the corporation, unless specially authorized by some statute, by-law, or resolution of the board of directors. Such authority being special, must in all cases be made to appear by the oath of the person signing and verifying the petition, or other competent evidence. In *re Moses A. McNaughton*, 8 B. R. 44; in *re Ralph Johnson*, 1 N. Y. Leg. Obs. 166; s. c. 5 Law Rep. 313.

Whether a corporation is a resident of the district or not, it may verify the petition by its agent. In *re John R. Hanibel*, 15 B. R. 233; s. c. 9 C. L. 165.

The agent to verify the petition need not be an officer of the corporation. *Ibid*.

When the petition is signed and certified by an agent there must be proof of his authority, either by his oath or otherwise. In *re Rosenfields*, 11 B. R. 86; s. c. 1 Cent. L. J. 583; in *re Joseph S. Hadley*, 12 B. R. 366; in *re Edward Sargent*, 13 B. R. 144; in *re John R. Hanibel*, 15 B. R. 233; s. c. 9 C. L. N. 165.

If the petition is signed by an agent of the petitioning creditor, it need not set forth the authority under which the agent acts. In *re California Pacific R. R. Co.*, 11 B. R. 193; s. c. 3 Saw. 240.

If there is no proof of the authority of the agent, the court may receive supplementary affidavits tending to prove the authority of the agent at the time when he signed and verified the petition. In *re Rosenfields*, 11 B. R. 86; s. c. 1 Cent. L. J. 583.

All creditors who are absent from the district may sign the petition by attorney. In *re California Pacific R. R. Co.*, 11 B. R. 193; s. c. 3 Saw. 240.

If the petition is verified by an agent, where there are more than five petitioning creditors, the fact of nonresidence should be stated and sworn to in the affidavit. In *re Solomon Simmons*, 10 B. R. 253; s. c. 1 Cent. L. J. 440; in *re Joseph S. Hadley*, 12 B. R. 366.

Where there are less than five petitioning creditors, the fact of nonresidence need not be stated in the affidavit when it is made by an agent. In *re Solomon Simmons*, 10 B. R. 253; s. c. 1 Cent. L. J. 440.

If the name of the agent who acts for one of the first five signers is not contained in the body of the verification, the petition is not sufficiently

verified, although the name is appended to the verification. In *re Rosenfields*, 11 B. R. 86; s. c. 1 Cent. L. J. 583.

When an agent verifies the petition, he should do so on behalf of his principals. In *re Solomon Simmons*, 10 B. R. 253; s. c. 1 Cent. L. J. 440.

If the petition purports to be signed by the agent of a creditor who never in fact consented thereto, it must be dismissed, where it merely alleges that all the petitioners constitute the requisite number, for no amendment in such case can be allowed. In *re Rosenfields*, 11 B. R. 86; s. c. 1 Cent. L. J. 583.

If the verification is made by an agent, it should state that the allegations are true to the best of the knowledge and belief of the principal, and not to the best of his own knowledge and belief. In *re John Brown*, 15 B. R. 416; s. c. 9 C. L. N. 191; s. c. 13 Pac. L. R. 205.

The jurat subscribed by the register need not contain a venue when it can be sufficiently collected from the deposition itself that the oath was administered where the officer resides. In *re Hill & Van Valkenburgh*, 5 Law Rep. 326.

The affidavit as well as the petition should be subscribed by the petitioner. The omission to subscribe the affidavit is an incurable defect. The petition is not a petition in propria forma, such as can be amended. *Moore & Bro. v. Harley*, 4 B. R. 242; s. c. 2 L. T. B. 666.

The verification is no part of the petition. It is necessary that it should accompany the petition only in order to predicate upon it certain prescribed action in furtherance of the jurisdiction acquired by the filing of the petition. A defective verification may, therefore, be amended. In *re Solomon Simmons*, 10 B. R. 253; s. c. 1 Cent. L. J. 440; in *re California Pacific R. Co.*, 11 B. R. 193; s. c. 3 Saw. 240; in *re Edward Sargent*, 13 B. R. 144.

An objection to a defective verification may be waived by the debtor. In *re Morris*, 11 B. R. 443.

**The Depositions.**—It is not necessary for each creditor joining in the petition to file a proof of his claim. That is required only of the first five signers. In *re Philadelphia Axle Works*, 1 W. N. 126.

The proof of debt should be according to Form 55, and not Form 22. In *re John Brown*, 15 B. R. 416; s. c. 9 C. L. N. 191; s. c. 13 Pac. L. R. 205.

The proof of debt must show that the creditor is still a creditor. In *re Western S. & T. Co.*, 13 Pac. L. R. 66.

A deposition in proof of the debt should state whether the claim is secured or not. *Cunningham v. Cady*, 13 B. R. 525; s. c. 8 C. L. N. 165.

The deposition of acts of bankruptcy must be such as constitutes legal testimony. Its statements must be of facts, and not the mere conclusions of the witness, and as a general rule they must be of the witness' own knowledge and not mere hearsay. They must be stated with such clearness as to leave no doubt as to their meaning. In *re Rosenfields*, 11 B. R. 86; s. c. 1 Cent. L. J. 583.

A deposition setting forth a transfer of property should give the time when it was made. In *re John R. Hanibel*, 15 B. R. 233; s. c. 9 C. L. N. 105.

A single member of a firm who are the petitioning creditors, is competent to depose to the act of bankruptcy. *Anon.*, 1 Cent. L. J. 182.

A deposition to an act of bankruptcy should be made upon the personal knowledge of the deponent. *In re Joseph S. Hadley*, 12 B. R. 366.

If any fact in a deposition to an act of bankruptcy is stated on information and belief, it should be stated with such particularity and details that the court may see from whom the information was derived, the circumstances under which it was acquired, and the weight that should be attached to it. *Ibid.*

A deposition to an act of bankruptcy, consisting of fraudulent conveyance, must allege or show the fraudulent intent of the debtor in making the conveyance. *Cunningham v. Cady*, 13 B. R. 525; s. c. 8 C. L. N. 165.

When a petition is amended by charging a new act of bankruptcy, a new deposition should be filed. *In re John R. Hanibel*, 15 B. R. 233; s. c. 9 C. L. N. 165.

If a deposition to an act of bankruptcy is defective through mistake or inadvertence, it may be amended. *Ibid.*

When the depositions are defective, the order to show cause may be stricken out. *Ibid.*

If no deposition to the act of bankruptcy is filed, the petition will be dismissed. *In re John Brown*, 15 B. R. 416; s. c. 9 C. L. N. 191; s. c. 13 Pac. L. R. 205.

A petition will not be dismissed because the depositions in support thereof are defective, but the petitioning creditor on motion will be allowed to file supplemental depositions. *Cunningham v. Cady*, 13 B. R. 525; s. c. 8 C. L. N. 165; *In re Joseph S. Hadley*, 12 B. R. 366. *Contra*, *May v. Harper et al.*, 4 B. R. 478; s. c. 4 Brewst. 253; s. c. 2 L. T. B. 181.

When depositions are defective, the order to show cause will be set aside, but a new order will be issued on supplemental depositions. *Cunningham v. Cady*, 13 B. R. 525; s. c. 8 C. L. N. 165.

If the officer who took the deposition omits to sign the jurat, he may be allowed to sign it after the deposition is filed. *In re James A. McKibben*, 12 B. R. 97.

A deposition to an act of bankruptcy can not be taken before a notary public. *Ibid.*

**The Amount.**—The object of notice to the creditors named in the list is to enable the petitioning creditors and others of the named creditors to show that the list is incorrect. The proper course to be pursued is to enter an order referring the case to the clerk or register to ascertain and report whether the requisite number of creditors have joined in the petition. *In re Hymes*, 10 B. R. 433; s. c. 7 Ben. 427; *In re Edward Sargent*, 13 B. R. 144.

The affirmative of the allegation and denial on the reference is with the petitioning creditors. *In re Hymes*, 10 B. R. 433; s. c. 7 Ben. 427.

Written or printed notice should be given by the clerk by mail, postage prepaid, to all of the creditors named in the list, at the addresses named in the list, of the time and place of reference and its object. Such notice

should contain a copy of the list with its names, places of residence and amounts. *Ibid.*

The debtor should attend on the reference and submit to an examination, if desired by the petitioning creditors, as to the matters embraced in the list or covered by the issue. *Ibid.*

The petitioning creditors are to be "one or more" in number; but whether one will suffice, or if more are necessary how many there must be, is to be determined by certain tests prescribed by the section. *Ibid.*

The creditors may elect to obtain one-fourth in number of the chief creditors, or one-fourth of all the creditors, provided that one-third in amount of all the debts are represented in the petition. In *re J. R. Currier*, 13 B. R. 68; in *re Robert L. Hall*, 15 B. R. 31; in *re William M. Lloyd*, 15 B. R. 257; s. c. 24 Pitts. L. J. 113.

It is not necessary that the chief creditors shall have been asked to sign and have refused. In *re J. R. Currier*, 13 B. R. 68.

Creditors whose claims are under \$250 are not to be counted in estimating the numbers, if one-fourth of the creditors above that sum join in the petition. If such number do not join, then creditors below \$250 may be counted to obtain the necessary number. In *re Woodford & Chamberlain*, 13 B. R. 575; s. c. 1 Cent. L. J. 37; in *re Reiman & Friedlander*, 11 B. R. 21; s. c. 7 Ben. 455; s. c. 13 B. R. 128; s. c. 12 Blatch. 562; in *re John B. Bergeron*, 12 B. R. 385; s. c. 10 Pac. L. R. 259; s. c. 2 Cent. L. J. 507; in *re Philadelphia Axle Works*, 1 W. N. 126.

In computing the amount, the aggregate of the petitioning creditor's debts must be equal to one-third of all the debts, irrespective of amount, provable against the estate. In *re Joseph S. Hadley*, 12 B. R. 366; in *re John B. Bergeron*, 12 B. R. 385; s. c. 10 Pac. L. R. 259; s. c. 2 Cent. L. J. 507; in *re J. R. Currier*, 13 B. R. 68; in *re Woodford & Chamberlain*, 13 B. R. 575; s. c. 1 Cent. L. J. 37; in *re Hugo Broich*, 15 B. R. 11; in *re William M. Lloyd*, 15 B. R. 257; s. c. 24 Pitts. L. J. 113. *Contra*, in *re Hymes*, 10 B. R. 433; s. c. 7 Ben. 427.

A party has the right to purchase a claim in good faith, with a view to enable himself to join in a petition in order to make up the necessary number. In *re Woodford & Chamberlain*, 13 B. R. 575; s. c. 1 Cent. L. J. 37; in *re J. A. & H. W. Shouse*, Crabbe, 482.

Where a sale of a claim is void for fraud or want of consideration, and is set aside for that reason, the claim in the court is to be deemed to belong to the assignor. In *re Woodford & Chamberlain*, 13 B. R. 575; s. c. 1 Cent. L. J. 37.

An indorsee who accepts payment from the indorser while the proceedings are pending, can not join in the petition, although the claim was proved but not filed before the payment. In *re Hugo Broich*, 15 B. R. 11.

The claim of a firm of which the debtor is a partner can not be counted. In *re William M. Lloyd*, 15 B. R. 257; s. c. 24 Pitts. L. J. 113.

If the debtor is a member of two different firms, the claim of one firm against the other can not be counted. *Ibid.*

In order to put a person into bankruptcy individually who is a member of a firm, one-fourth in number of all his creditors, both individual and

partnership, must unite in the petition, and the aggregate of the debts of the petitioning creditors must amount to one-third of all the debts both individual and partnership. *Ibid.*

A creditor who has issued an attachment within four months before the commencement of the proceedings in bankruptcy can not be reckoned in computing the proportion of creditors who must unite in the petition. *In re C. G. Scrafford*, 14 B. R. 184; s. c. 15 B. R. 104; s. c. 4 Cent. L. J. 19. *Contra*, *in re Hugo Broich*, 15 B. R. 11.

A debt barred by the statute of limitations in Wisconsin is not provable, and can not be reckoned in computing the number who must join in an involuntary petition filed in that State. *In re Theodore Noesen*, 12 B. R. 422; s. c. 6 Biss. 443.

A petition by creditors who are entitled to petition alone is not affected by the joining of another creditor whose debt is insufficient. *In re Tower*, 1 N. Y. Leg. Obs. 8; s. c. 5 Law Rep. 214; s. c. 1 Penn. L. J. 209.

Creditors who have received and still hold fraudulent preferences are not counted in determining whether the requisite number of creditors, as to value, have joined in the petition. *In re M. C. Israel*, 12 B. R. 204; s. c. 3 Dillon, 511; *Clinton v. Mayo*, 12 B. R. 39; *in re J. R. Currier*, 13 B. R. 68.

A secured creditor may be a petitioning creditor, but the amount at which his debt is to be reckoned is to be ascertained by deducting the value of the security. *In re California Pacific R. R. Co.*, 11 B. R. 193; s. c. 3 Saw. 240; *in re Stansell*, 6 B. R. 183; *in re Daniel Sheehan*, 8 B. R. 345; *in re W. B. Alexander*, 4 B. R. 178; s. c. Lowell, 470; s. c. 2 L. T. B. 238; *Eccort v. Greely*, 6 B. R. 433; s. c. 4 C. L. N. 209; *in re Hugo Broich*, 15 B. R. 11. *Contra*, *in re Johann*, 3 B. R. 144; s. c. 4 B. R. 434; s. c. 2 Biss. 139; s. c. 2 L. T. B. 92; *in re Jacob Frost*, 11 B. R. 69; s. c. 6 Biss. 213; *in re Green Pond R. R. Co.*, 13 B. R. 118.

If a secured creditor joins in an involuntary petition without referring to his security, he thereby waives it, and his claim should be counted. *In re Hugo Broich*, 15 B. R. 11.

If the petitioning creditors do not constitute one-fourth in number, and there is no allegation to that effect, the petition will be dismissed without allowing any time for other creditors to unite therein. *In re Thomas F. Burch*, 10 B. R. 150.

The petitioning creditors must be held to good faith, and can not recklessly file a petition for the purpose of making the respondent file a statement of his creditors. Such a fishing petition can not be entertained. If it appears to the court by affidavit or otherwise, that at the time of filing the petition the creditors joining in it knew that they did not constitute the requisite number, the petition should be dismissed. The matter may be brought before the court by a motion. *In re J. Young Scammon*, 11 B. R. 280; s. c. 6 Biss. 145, 195.

If the petitioning creditors deny that the list of creditors filed by the debtor is true, either as to the nature or amount of the debts, the case may be referred to a register to take proof and report as to the correctness of the list. *In re Jacob Frost*, 11 B. R. 69; s. c. 6 Biss. 213.

The same number and amount of creditors must join in a proceeding to force a corporation into bankruptcy as is required in the case of an individual. In *re Leavenworth Savings Bank*, 14 B. R. 82, 92; in *re Detroit Car Works*, 14 B. R. 243; in *re Oregon B. Printing Co.*, 14 B. R. 394; s. c. 13 B. R. 190; s. c. 14 B. R. 405; s. c. 3 Saw. 529, 614.

If there is no reference for the purpose of ascertaining whether sufficient creditors have joined in the petition, other creditors may unite in the proceedings. In *re Frank Frisbie*, 15 B. R. 522.

While the investigation of the list of creditors is pending, the court may provisionally limit the period within which other creditors may join in the petition, and such time will not be enlarged, except for sufficient cause. In *re Benjamin Bullock*, 1 W. N. 22.

The register's report should contain a list of the claims counted and of those rejected. In *re William M. Lloyd*, 15 B. R. 257; s. c. 24 Pitts. L. J. 113.

If an order is entered dismissing a case — unless an amended petition is filed, a creditor who transferred his debt after the filing of the original petition can not unite in the amended petition. In *re Western S. & T. Co.*, 13 Pac. L. R. 66.

**The Petitioner's Debt.**—(1) It is not necessary that the debt should have existed at the time the act of bankruptcy was committed. The creditor who can file a petition for involuntary bankruptcy is one whose debt is provable under the act. Section 5067 declares that all debts due and payable at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, may be proved against the estate of a bankrupt. A debt existing at the time the petition is filed, if a valid one, is sufficient to support the proceedings. *Phelps v. Classen*, 3 B. R. 87; s. c. 1 Wool. 204. *Contra*, in *re Muller & Brentano*, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33.

A debt contracted prior to the passage of the act is sufficient. In *re John W. Hull*, 1 N. Y. Leg. Obs. 1.

The provisions of the bankruptcy act, literally construed, are wholly unambiguous, and authorize a creditor whose debt is not due to become a petitioner. His debt exists at and before the adjudication of bankruptcy, and is, therefore, a provable debt. Being a provable debt, it is sufficient to maintain the petition. *Linn v. Smith*, 4 B. R. 46; s. c. 1 L. T. B. 229; s. c. 3 L. T. B. 218; in *re Ouimette*, 3 B. R. 566; s. c. 1 Saw. 47; in *re W. B. Alexander*, 4 B. R. 178; s. c. Lowell, 470; s. c. 2 L. T. B. 238; in *re Samuel King*, 1 N. Y. Leg. Obs. 276; in *re Tower*, 1 N. Y. Leg. Obs. 8; s. c. 5 Law Rep. 214; s. c. 1 Penn. L. J. 209.

When the petition alleges the debt to be due and payable, and the proof shows that the debt was not due at the time of the filing of the petition, the variance will not be fatal, because the averment that the debt was due was not necessary. *Linn v. Smith*, 4 B. R. 46; s. c. 1 L. T. B. 229; s. c. 3 L. T. B. 218.

When the petitioning creditor has received the notes of third parties, to be applied to the payment of his debt, if they should on inquiry be found collectible, the delivery of the notes amounts to a conditional pay-

ment. If the notes are paid or collected according to their tenor, the debt of the petitioner would be paid and extinguished. If they are not so paid or collected, and the petitioner has not been guilty of negligence in the premises, the delivery would amount to nothing. The petitioner having agreed to take the notes as payment if they were collectible, thereby bound himself to sue upon them if suit should be necessary for their collection. An agreement to take notes as payment if they are proved collectible, implies something more than to take them if they are paid. It is equivalent to an agreement to collect them so far as the same can be done by the use of ordinary diligence. It is not the proper construction of the agreement, that the petitioner agreed to take the notes, if, on inquiry, he should find them collectible, and it ought not to be so interpreted. If the notes were in fact collectible, they were, from the date of their delivery, so far payment of the debt. If this conditional payment has in fact turned out to be no payment, by reason of the notes proving worthless or uncollectible, notwithstanding the due diligence of the petitioner, he should produce them at the trial, and surrender them to the debtor. If the balance that remains, after deducting the amount of the collectible notes, is less than \$250, it will not be sufficient in amount to enable the petitioner to maintain his petition. *In re Oulmette*, 3 B. R. 566; s. c. 1 Saw. 47.

When the nature of the petitioner's demand is fully set forth in the petition, the question, whether the debt is provable or not, is one of law and not of fact merely, and the court must decide it. *Sigsby v. Willis*, 3 B. R. 207; s. c. 3 Ben. 371; s. c. 1 L. T. B. 71.

A joint liability upon a bond given by the petitioner and the debtor, and secured by a mortgage, is not sufficient to support a petition. The joint obligor can not prove his claim in a case where the principal creditor could prove, and the creditor could not prove, because he has security upon the property of his debtor. Nor can the petitioner sustain his petition upon the ground that he has a contingent debt or a contingent liability. It can hardly be supposed that it was intended that a petition against a debtor should be maintained upon the allegation that upon a certain contingency, which might never happen, the party proceeded against would become a debtor. The provision that authorizes an application to the court to have the present value of the debt or liability ascertained, only authorizes proof of the amount so ascertained, and it is, to say the least, very doubtful whether, in case of such a joint bond, there is any provable debt within the meaning of the statute until the amount is so ascertained. *Ibid*.

If two firms share in a certain venture, and deposit the proceeds in bank under the name of one of them, with the word "Co." added, the agreement will not constitute a partnership between the members of the two firms, nor will a check drawn upon the bank establish that there is such a copartnership. *In re J. H. Warner et al.*, 7 B. R. 47; s. c. 4 Pac. L. R. 123.

A participation in the profits is presumptive proof that the participant is a partner, and sufficient proof in the absence of all other opposing circumstances. If the alleged dormant partner receives interest on the

money placed at the disposal of the firm, and a compensation beyond the usual rate as bookkeeper, the circumstance indicates that the arrangement is either a device to cover up a partnership in the profits or a usurious loan. As it is not unlawful to be a dormant or secret partner, and it is to loan money at usurious interest, the law will presume that the contingent and extra compensation for keeping the books is a device to enable the party to share in the profits as partner. In *re Francis & Buchanan*, 7 B. R. 359; s. c. 2 Saw. 286.

The petitioner may proceed against one partner, even though the debt proved is a partnership debt. Upon principle as well as authority, a partnership creditor has such an interest in the property of any one of the partners that he may proceed against one alone upon proof of his debt. In *re Melick*, 4 B. R. 97.

A creditor who has taken the property of a debtor upon legal process can throw him into bankruptcy for that act. In *re C. A. Davidson*, 3 B. R. 418; s. c. 4 Ben. 10; *Coxe v. Hale*, 8 B. R. 562; s. c. 10 Blatch. 56.

The institution of proceedings at law or in equity does not conclude the creditor from afterward abandoning such proceedings and coming into the bankruptcy court at any time before such proceedings have resulted in a satisfaction of the debt. The issue and levy of an execution does not take away the right of the creditor to institute proceedings in bankruptcy. In *re Daniel Sheehan*, 8 B. R. 345.

A judgment will sustain a petition for an adjudication of bankruptcy, although a writ of error is pending, and a bond has been filed to stay execution. *Ibid.*

If the petitioning creditor has received the debtor's note well indorsed in part payment of his account, and has passed it to another, the amount due is the balance that remains after the credit for the note is given. *Culver v. Calender*, 5 Law Rep. 125.

Involuntary proceedings in bankruptcy are not in any sense proceedings merely for the collection or security of the particular debt of the petitioning creditor. They are for the benefit of all the creditors. The fact that the petitioning creditor has a provable debt to the requisite amount is necessary to be shown for two purposes only: 1st. To show that the alleged debtor occupies that relation; 2d. To show that the petitioner has the requisite qualifications to commence the proceedings. Its office is then exhausted, and it has not, and is never given, any other or further force or effect. The petitioning creditor stands in no better or more favorable position after adjudication than any other creditor. He must prove his debt in the course of the bankruptcy proceedings the same as any other creditor. His debt may be opposed, adjudicated upon, and allowed, abated or expunged the same as any other debt. In *re Daniel Sheehan*, 8 B. R. 345.

A tender in court of the amount due to the petitioner can not defeat the petition. If the debtor is insolvent, it would not be proper for the petitioner to accept payment in full at the expense of the other creditors. But the fact that there are no other creditors to be prejudiced by, and complain of, the payment, can not be presumed to be within the knowl-



edge of the petitioner. Before he accepts the tender, he must inquire concerning it, and he may be mistaken. Besides, no understanding of the petitioner, or proceedings between him and the debtor upon such question, could prevent third persons, who might be creditors, from asserting their rights as such. In *re Williams & Co.*, 3 B. R. 286; s. c. Lowell, 406; s. c. 2 L. T. B. 100; in *re Ouinette*, 3 B. R. 566; s. c. 1 Saw. 47.

A debtor who is solvent may pay any or all of his debts although proceedings in bankruptcy are pending against him. In *re Oregon B. Printing Co.*, 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.

Where a trust in the strict and technical sense exists, cognizable only in a court of equity, it will not be affected by the statute of limitations. But an agent who receives money to deposit in a savings bank, but converts it to his own use, and immediately notifies his principal of the conversion, is not a trustee in that sense of the term. From the day the principal was advised of the conversion the claim became a legal debt, enforceable at law and not in equity. From that date it was a simple legal demand upon which the statute of limitations ran. In *re Cornwall*, 4 B. R. 400; s. c. 6 B. R. 305; s. c. 9 Blatch. 114; s. c. 2 L. T. B. 220.

A creditor who has received an unlawful preference in respect to the debt set forth in the petition, can not maintain the petition without a surrender of the preference. In *re Peter Rado*, 6 Ben. 230.

If the petitioning creditor has received a preference upon his debt, he can maintain his petition by making a voluntary surrender of such preference for the benefit of the creditors of the estate. In *re Hunt & Hornell*, 5 B. R. 433; in *re Marcer*, 6 B. R. 351; s. c. 29 Leg. Int. 76.

A petition in involuntary bankruptcy can not be sustained by one whose claim is barred by the statute of limitations of the State in which the petition is brought. *Cornwall v. Cornwall*, 6 B. R. 305; s. c. 6 A. L. Rev. 865.

If it appears at any stage of the trial that the case is not within the bankruptcy law, the proceedings must be dismissed. If the petitioning creditor, after the filing of the petition, receives payment sufficient to reduce the amount of his debt below \$250, he can not prosecute the case any further. The cost incurred by him in the proceedings can not be added to his debt to make up the requisite amount. The debtor must owe his creditor \$250, and be guilty of an act of bankruptcy, before the creditor has any right to make costs for the purpose of having him adjudicated a bankrupt. In *re Skelley*, 5 B. R. 214; s. c. 3 Biss. 260.

If the principal of the petitioning creditor's debt is less than \$250, but exceeds that sum if the interest up to the date of the petition is added, the adjudication will be deemed valid when assailed in a collateral proceeding. *Sloan v. Lewis*, 12 B. R. 173; s. c. 68 N. O. 557; s. c. 22 Wall. 150.

If a creditor was induced to release his claim through the misrepresentation of another creditor, the release is void, and the debt is sufficient. *Michaels v. Post*, 12 B. R. 152; s. c. 21 Wall. 398.

It is no defense in bankruptcy that the petitioner is the only creditor, or that he has an adequate remedy at law or in equity in the State or Federal

courts. The bankruptcy act protects all creditors, and is additional to other remedies where it applies. It is immaterial that the expenses in bankruptcy bear a very large proportion to that part of the petitioner's debt which remains unsecured. It is not a matter of discretion, but of strict right, that he shall be permitted to proceed in bankruptcy if he chooses to do so. *In re W. B. Alexander et al.*, 4 B. R. 178; s. c. *Lowell*, 470; s. c. 2 L. T. B. 238; *Ecfort v. Greely*, 6 B. R. 433; s. c. 4 Q. L. N. 209.

A creditor who holds security upon the property of a third person has a provable debt for the full amount against the estate of his debtor. If the debtor is a surety and pays the debt, he may be entitled to the benefit of the collateral security. But in bankruptcy it seems more just and equitable that the creditor should have the benefit of all his remedies, so that he may obtain his whole debt if possible. If he is obliged to realize his security and prove only for the balance, he will be losing the advantage for which he has stipulated of the full credit of the promise of the surety. *In re W. B. Alexander et al.*, 4 B. R. 178; s. c. *Lowell*, 470; s. c. 2 L. T. B. 238; *Fox v. Eckstein*, 4 B. R. 373.

Although the law does not expressly require that the list of creditors presented by the debtor in denial that the requisite number and amount of creditors have joined in the petition, should be sworn to by him, the general intent of the act indicates that it should be done. The list of his creditors is peculiarly within his own knowledge, and the petitioning creditor is entitled to the benefit of a sworn list, so that he may have some assurance that fictitious claims are not inserted. *In re Louis E. Steinman*, 10 B. R. 214; s. c. 6 Biss. 166; *in re Hymes*, 10 B. R. 433; s. c. 7 Ben. 427; *Barnett v. Hightower*, 10 B. R. 157.

**Amendment.**—It belongs to courts of justice, as the general rule, to permit amendments of proceedings before them when they have obtained jurisdiction of the person and of the subject-matter, and it would be strange if the district court, in the administration of the bankruptcy law, should be held incompetent to allow such amendments. The exercise of the power may often be indispensable to the complete attainment of justice. The rules in bankruptcy made by the supreme court contemplate the exercise of this power, and are at least evidence that the supreme court deemed that such amendments might lawfully be allowed. *Hardy v. Binninger*, 4 B. R. 262; s. c. 7 Blatch. 262.

The petition may be amended. Special reasons must be given to obtain an amendment to a sworn petition, or the pleadings, which are required to be verified by the oath of the party; and where the object is to introduce new facts or change essentially the grounds of the prosecution or the defense, the courts are disinclined to allow such amendments, except for very special reasons, and where they are clearly required in the furtherance of justice. *In re Crowley & Hoblitzell*, 1 B. R. 516; s. c. 1 L. T. B. 79; *in re Craft*, 1 B. R. 378; 2 B. R. 111; s. c. 2 Ben. 214; s. c. 6 Blatch. 177; *in re Waite & Crocker*, 1 B. R. 373; s. c. *Lowell*, 207; *in re Houghton*, 1 B. R. 460; *in re Hill & Van Valkenburgh*, 5 Law Rep. 326.

The application for leave to amend should be accompanied by a copy

of the proposed amendments, and notice thereof should be served on the opposite party. In *re Crowley & Hoblitzell*, 1 B. R. 516; s. c. 1 L. T. B. 79.

It should be shown that the petitioners and their attorneys were not advised of the facts sought to be added by the amendment at the time the original petition was prepared, or that they were omitted from inadvertence, mistake, or other reason which might excuse such omission, and that application for leave to amend was made within reasonable time after the necessity for amendment was discovered. *Ibid*.

Where an act of bankruptcy is clearly established, and especially where something more than a mere technical violation of the law may be suspected, it is the duty of the court to allow such amendments and further allegations to be made as may sustain the proceedings. In *re A. B. Gallinger*, 4 B. R. 729; s. c. 1 Saw. 224.

A merely formal amendment, which can not take the debtor by surprise, may be allowed, when it appears to be due to justice, even at the hearing, and after all the testimony in the case has been taken. In *re Craft*, 1 B. R. 378; 2 B. R. 111; s. c. 2 Ben. 214; s. c. 6 Blatch. 177; in *re Waite & Crocker*, 1 B. R. 373; s. c. Lowell. 207; in *re Haughton*, 1 B. R. 460; in *re A. B. Gallinger*, 4 B. R. 729; s. c. 1 Saw. 224.

Amendments which would introduce into the petition entirely new acts of bankruptcy, founded upon facts not referred to in the petition, and alleged to have been committed more than six months prior to the application for leave to amend, will not be allowed. In *re Crowley & Hoblitzell*, 1 B. R. 516; s. c. 1 L. T. B. 79; in *re Craft*, 2 B. R. 111; s. c. 6 Blatch. 177.

An amendment to add a new party will not be allowed after all the testimony is taken and the case is before the court upon final hearing. In *re Chas. S. Pitt*, 14 B. R. 59.

While it is in the discretion of the court, at any stage of the proceedings, in furtherance of justice, to permit amendments to be made to pleadings, it is a discretion properly limited to the same cause of action, not to permit, under the form of amendments, new causes of action to be introduced, thus perverting the power to amend into a power to substitute one cause of action for another. The petitioning creditor, like a plaintiff, brings a definite cause of action, and makes allegations accordingly, and the allegata and probata must correspond at the trial. The defendant appears to meet the allegations made and no others. If there has been an informal or imperfect statement, the court can permit the needed corrections to be made on such terms as justice demands, but it would be an unjust and unjustifiable action on its part to convert, under the name of an amendment, one cause of action into another, entirely distinct, and calling for different proofs and for different proceedings. In *re Leonard*, 4 B. R. 563; s. c. 2 L. T. B. 177.

If the allegation in regard to the joining of the requisite proportion of the creditors in the petition is defective, it may be amended. In *re James A. McKibben*, 12 B. R. 97; in *re Joseph S. Hadley*, 12 B. R. 366; in *re Morris*, 11 B. R. 443.

The petition ought to make a complete case for adjudication, and defects in it can not be supplied by affidavits. In *re James A. McKibben*, 12 B. R. 97.

An amendment relates back to the commencement of the proceedings in bankruptcy, and gives effect to the action of the court upon an imperfect petition. In *re Williams & McPheeters*, 11 B. R. 145; s. c. 6 Biss. 233.

When an amendment introduces new matter, it should be met by an answer. *Hardy v. Binniger*, 4 B. R. 262; s. c. 7 Blatch. 262.

An objection may be taken to a defect in an amended petition, although it might have been made to the original petition, but was not. In *re Western S. & T. Co.*, 13 Pac. L. R. 66.

In an action for fraud, in receiving money after the filing of an involuntary petition, an allegation that it was received in good faith under an expectation of effecting a compromise with all the creditors, is a good defense. *Van Alstyne v. Crane*, 4 N. Y. Supr. 113.

**Limitation.**—The six months' limitation provided for in this clause applies solely to the time within which the petition for adjudication of bankruptcy must be filed, and not to the time within which a preference may be attacked. In *re Tonkin & Trewartha*, 4 B. R. 52; s. c. 1 L. T. B. 232; s. c. 3 L. T. B. 221; *Collins v. Gray*, 4 B. R. 631; s. c. 8 Blatch. 483.

In the absence of any evidence to the contrary, it will be presumed that the date of an instrument was the time of its execution and delivery. The six months will only begin to run from the time of the actual execution and delivery of the deed. In *re Rooney*, 6 B. R. 163.

If a deed is not recorded within the period allowed by the State laws for the registration of deeds, the time will run from its recording and not from the time of its delivery. *Thornhill v. Link*, 8 B. R. 521.

**What Preferences are Void.**—(m) The prohibition contained in this clause applies equally to section 5128 and section 5021. It probably would not have been inserted if sections 5128 and 5021 had covered no other class of cases than preferences. They do, however, provide for recovery in other cases than those of preference merely, such as payments, sales, etc., with a view to prevent the debtor's property from coming to his assignee, etc.; and money, goods, etc., obtained by a creditor as an inducement to forbear opposition to the bankrupt's discharge; and assignments, gifts, etc., with intent to delay, defraud, or hinder creditors. This express prohibition was inserted in order to prescribe one general rule, applicable alike to all cases of recovery of money or other property paid, conveyed, etc., to creditors contrary to the bankruptcy act. In *re Tonkin & Trewartha*, 4 B. R. 52; s. c. 1 L. T. B. 232; s. c. 3 L. T. B. 221; in *re Thos. C. Evans*, 3 B. R. 261; *Bingham v. Richmond*, 6 B. R. 127; *Bingham v. Frost*, 6 B. R. 130.

This section is a very long one, and recites all the acts which subject a person to involuntary bankruptcy, and that is its main purpose. Among the acts which constitute a man a bankrupt, are those of giving preference to creditors in contemplation of bankruptcy. And it is in the conclusion of this section declared in general terms that if the debtor shall subsequently be declared a bankrupt, his assignee may recover the money or other property which was the subject of the act of bankruptcy. But the general declaration of the right of the assignee to recover is not inconsistent with the limitation of the right in another section in cases accruing within six and four months of the commencement of proceed-

ings in bankruptcy. Sections 5021 and 5128 having, for the first time, set up a rule by which certain payments and transfers of property shall be declared void—a rule at variance with the common law and with the statutes of the several States—very properly limit and define the circumstances within which this new rule shall operate. These are, among others: that the recipients of the bankrupt's property must have had reasonable cause to believe he was insolvent, and that the transaction must have been recent; when the bankruptcy law is applied to the case of a creditor, within four months, and, with the general purchaser, within six months. *Bean v. Brookmire*, 4 B. R. 196; s. c. 1 Dillon, 24; *Hubbard v. Allaire Works*, 4 B. R. 623; s. c. 7 Blatch. 284; *Collins v. Gray*, 4 B. R. 631; s. c. 8 Blatch. 483.

This amendment does not apply to suits brought to recover preferences before December 1, 1873. *Hamlin v. Pettibone*, 10 B. R. 172; s. c. 6 Bliss. 167; *Van Dyke v. Tinker*, 11 B. R. 308; in re *Simeon Leland*, 7 Ben. 436.

The penalty upon a creditor provided for by this clause is enforceable against him only in case he compels the assignee to resort to legal proceedings to recover back the property transferred in violation of the act, and in case such proceedings are successful. The provisions of section 5084 must be construed, in connection with this clause, in such a manner that, if possible, both may stand. A creditor who claims to retain the property, makes himself conclusively a party to the fraud against the act, by resisting the claim of the assignee to recover the property in case the assignee is successful; but where the creditor avails himself of the locus poenitentiae given to him by section 5084, and voluntarily surrenders the property to the assignee, he ceases to be a party to the fraud, and may prove his debt in bankruptcy and receive dividends on it. In re *C. A. Davidson*, 3 B. R. 418; s. c. 4 Ben. 10; in re *H. B. Montgomery*, 3 B. R. 137; s. c. 3 Ben. 565; in re *Scott & McCarty*, 4 B. R. 414; in re *Princeton*, 1 B. R. 618; s. c. 2 Bliss. 116; s. c. 1 L. T. B. 125; in re *J. J. & C. W. Walton*, 4 B. R. 467; s. c. 1 Deady, 598; s. c. 1 L. T. B. 162; in re *Colman*, 2 B. R. 563.

A creditor who, after suit has been brought against him by the assignee, and before trial, voluntarily releases his preference and surrenders it to the assignee, can not prove his debt. *Phelps v. Stern*, 4 B. R. 34.

If a mortgage is given to a creditor without his knowledge, or if a creditor upon receipt of such knowledge repudiates it, the prohibition is not to be enforced against him. In re *Princeton*; 1 B. R. 618; s. c. 2 Bliss. 115; s. c. 1 L. T. B. 125.

But when the creditor does nothing in disaffirmance of the preference after he has been informed of it, he makes himself liable to the penalty. In re *Colman*, 2 B. R. 563.

Sections 5084 and 5021 are reconcilable by confining the latter to actual frauds as contradistinguished from constructive frauds. *Babbitt v. Walbrun & Co.*, 4 B. R. 121; s. c. 1 Dillon, 19.

This clause only refers to the debt sought to be preferred, and not to other debts in respect to which no preference was attempted to be given. A preferred creditor who has other claims that were not preferred should be allowed to prove them. In re *Arnold*, 2 B. R. 160.

In cases of actual fraud, a preferred creditor can not prove for a moiety of his debt until he has surrendered his preference. In *re Cramer*, 13 B. R. 225; s. c. 8 C. L. N. 106; in *re J. Schoenenberger*, 15 B. R. 305.

The provision which prevents a creditor in case of actual fraud from proving more than a moiety of his debt, only applies when there has been a recovery. In *re John Riorden*, 14 B. R. 332; s. c. 51 How. Pr. 271.

A mere fraud on the bankruptcy law by accepting a preference in violation of its provisions is not an actual fraud. *Ibid.*

ACTS OF 1867 and 1874, § 5022. Any act of bankruptcy committed since the second day of March, eighteen hundred and sixty-seven, may be the foundation of an adjudication of involuntary bankruptcy, upon a petition filed within the time prescribed by law, equally with one committed hereafter.

§ 5023. [This section is repealed by act of June 22, 1874, ch. 390, § 12, 18 Stat. 180.]

ACTS OF 1867 and 1874, § 5024. Upon the filing of the petition authorized by the preceding section, if it appears that sufficient (a) grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted. The court may also by injunction, (b) restrain the debtor, and any other person, in the meantime, from making any transfer or disposition of any part of the debtor's property, not excepted by this Title, from the operation thereof, and from any interference therewith; and if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or to make any fraudulent conveyance or disposition thereof, the court may issue a warrant (c) to the marshal of the district, commanding him to arrest and safely keep the alleged debtor, unless he shall give bail to the satisfaction of the court for his appearance from time to time as required by the court, until its decision upon the petition, or until its further order, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court.

Statute revised — March 2, 1867, ch. 176, § 40, 14 Stat. 536.

Sufficient Grounds.— (a) The commencement of the proceedings is the filing of the petition, and no valid order can be made until the proceedings are commenced. *Ala. & Chat. R. R. Co. v. Jones*, 7 B. R. 145.

A *prima facie* case must be established by the proofs offered to sustain the allegation of the petition. It would otherwise be abhorrent to the sense of justice and right that the very stringent proceedings connected with the creditor's petition should be admissible, viz: seizure of the debtor's property, injunction, and arrest. If there is not proof sufficient to make it appear that the acts of bankruptcy charged have been committed, no order on the defendant to show cause can be granted, and the petition falls. If such proof is made, *allegata* and *probata* corresponding, and the order to show cause is entered, then, under proper proofs, the court may even grant warrants of arrest and seizure, and issue injunctions. All of the subsequent proceedings are based on the initial proofs that "sufficient grounds" exist; that is, that *prima facie* the defendant has committed the act of bankruptcy. *In re Leonard*, 4 B. R. 563; s. c. 2 L. T. B. 177; *in re Price & Miller*, 8 B. R. 514.

An order to show cause issued upon a petition unsupported by any proof of the act of bankruptcy or of the creditor's claim is void and of no effect. *In re Davis Rogers*, 10 B. R. 444; s. c. 1 Cent. L. J. 470.

The debtor, from and after the commencement of proceedings in bankruptcy against him, is by the act denominated or called a bankrupt, and is subject to the orders of the court in all matters relating to his bankruptcy. *In re Bromley & Co.*, 3 B. R. 686.

**Injunction.**—(b) The averments in the petition for an injunction should be positive, and not on information and belief merely. When the affidavits filed upon a motion to dissolve an injunction do not sustain the allegations of the petition, but disclose the existence of another ground for an injunction, the petition may be amended so as to cover that ground. Nothing would be gained by dissolving the injunction, and then reissuing upon the same state of facts. *In re Bloss*, 4 B. R. 147; s. c. 2 L. T. B. 126.

An injunction can not be granted on a summary petition against a party who claims adversely to the proceedings under a conveyance from the bankrupt, although the conveyance may be void under the bankruptcy law. *In re Charles J. Marter*, 12 B. R. 185.

The bill need not be verified by the oath of the creditor himself, but will be sufficient if verified by the oath of his agent or attorney. *In re Fendley*, 10 B. R. 250; s. c. 1 Cent. L. J. 433.

A trustee claiming under an assignment for the benefit of creditors, may be enjoined from disposing of the property. *In re Jacob Skoll*, 24 Pitts. L. J. 207; s. c. 9 C. L. N. 377.

An injunction may be issued without notice. The court, however, may require notice to be given to the adverse party, and even that the applicant shall give security for damages, whenever it thinks that the ends of justice or the security of parties require it. *In re Muller & Brentano*, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33; *Irving v. Hughes*, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451.

"Other person" has reference to parties interfering with the property of an individual not yet adjudicated an involuntary bankrupt, and which is to be preserved inviolate until his bankruptcy has been legally ascertained. *In re Campbell*, 1 B. R. 165; s. c. 1 Abb. C. C. 185; s. c. 1 L. T. B.

30; s. c. 6 Phila. 445; Irving v. Hughes, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451.

When a petition for an injunction is presented at the same time with the petition for an adjudication of bankruptcy, the court may look to the facts set forth in the former petition to ascertain whether the requisite proportion of the creditors have joined in it. In re California Pacific R. R. Co., 11 B. R. 193; s. c. 3 Saw. 240.

When the injunction is sought by a bill in equity, the respondent can not, craving oyer of the petition in bankruptcy, demur to the bill on the ground that the petition does not set up any act of bankruptcy, for the demurrer only goes to the sufficiency of the bill, and can not raise any question as to the sufficiency of the petition. Blackburn v. Stannard, 5 Law Rep. 250.

A bill for an injunction against third parties who have accepted of a transfer from the debtor, should allege some danger either threatened or imminent to the property. Ibid.

A bill for an injunction should contain a description of the property. A mere allegation that it is personal estate is not sufficient. Ibid.

An injunction may be in the form of an order addressed to the debtor and all other persons who may attempt to transfer or interfere with his property. The fact that such other persons are not named in the order makes no substantial difference, for it plainly apprises them of what they are restrained from doing. Any distinction between a writ of injunction and an order in the nature of one is disregarded in practice. In re Lady Bryan Mining Co., 6 B. R. 252.

The injunction is temporary only, and is intended to restrain the disposition of the goods and property of the debtor until an adjudication can be had, and an assignee appointed to take charge of the assets for the benefit of the creditors. Creditors v. Cozzens, 3 B. R. 281; s. c. 2 W. J. 349; s. c. 16 Pitts. L. J. 236; Irving v. Hughes, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451; in re R. & L. Calender, 5 Law Rep. 129; in re Metzler et al., 1 B. R. 38; s. c. 1 Ben. 356; in re Kintzing, 3 B. R. 217.

The injunction granted under this section continues until vacated by order of the court, although the debtor is adjudicated a bankrupt. In re Fendley, 10 B. R. 250; s. c. 1 Cent. L. J. 433.

When an injunction is asked for, at the commencement of the proceedings, against any person other than the debtor, a separate petition should be filed, so that the proceedings upon the injunction need not be complicated with those praying the adjudication of bankruptcy. Irving v. Hughes, 2 B. R. 62; s. c. 7 A. L. Reg. 209; s. c. 6 Phila. 451; Creditors v. Cozzens, 3 B. R. 281; s. c. 2 W. J. 349; s. c. 16 Pitts. L. J. 236.

It is immaterial whether the order to show cause is in proper form or not. The jurisdiction of the court to issue an injunction against persons other than the debtor, or to issue a provisional warrant to take possession of the debtor's goods, is not dependent upon the service on the debtor of a proper order to show cause. In re Muller & Brentano, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33.



*Quaere*, Will the injunction allowed by this section extend to a case of voluntary bankruptcy, or protect what may be a mere right of action in the assignee to recover the proceeds of property which has been sold under a judgment rendered in a State court? In *re Price Fuller*, 4 B. R. 115; s. c. 1 Saw. 248.

If the petitioner shows a covinous contrivance between the bankrupt and other parties to embezzle the estate for the benefit of the bankrupt or his preferred creditors, the district court will award an injunction restraining them from disposing of the property. In *re John Harper Smith*, 1 N. Y. Leg. Obs. 249.

The district court, before awarding an injunction against parties other than the bankrupt, may require security to an amount adequate to cover all probable losses. *Ibid*.

The district court will not allow an injunction against a trustee claiming under an assignment, merely on the apprehension of a creditor that the property may be dissipated or put out of the trustee. The court will interfere with this high process only in case of actual and imminent danger to the property of the bankrupt, and not as a mere preventive against its possible waste or misapplication. In *re John Nightingale*, 1 N. Y. Leg. Obs. 8.

When the grounds set forth in the motion for a dissolution of an injunction go to the merits of the case, and the debtor has denied the acts of bankruptcy, and prayed a jury trial, the court will not grant the dissolution, and thus on affidavits dispose of what are really all the issues involved in the proceedings. In *re Metzler et al.*, 1 B. R. 38; s. c. 1 Ben. 356.

When a creditor seeks to dissolve an injunction issued against him to prevent a preference, his petition must negative the circumstances which would, under section 5128, make the transfer void. In *re Binns*, 4 Ben. 152.

Upon the hearing of a motion to dissolve an injunction, affidavits for the party making it, and counter affidavits for those resisting it, may be read. In *re Bloss*, 4 B. R. 147; s. c. 2 L. T. B. 126.

A claimant of property seized under the provisional warrant can not urge as grounds for dissolving the injunction, that the order to show cause is irregular, or that the petition does not show at what time the act of bankruptcy was committed, or that there is no positive charge of an act of bankruptcy, or that the proof of debt does not show that the debt existed at the time the act of bankruptcy was committed. Nor will the court, on a motion for dissolution, decide the question of title to the property. In *re Muller & Brentano*, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33.

When the *prima facie* case made out by the petition is not rebutted, the injunction can not be dissolved. In *re Dean & Garrett*, 2 B. R. 89.

There is no party to a creditor's petition except the petitioning creditor and the bankrupt. The service of an injunction upon a person does not make him a party to the proceedings. He may have a wrongful injunction dissolved, but he has no right to contest or vacate an adjudication. That is a matter in which he can have no interest. A party who seeks

to annul an adjudication, must show some priority of interest in the property of the debtor. *Carr v. Whitaker*, 5 B. R. 123.

A party, not the debtor, can not be punished for contempt in violating an injunction issued in accordance with the prayer contained in the petition in involuntary bankruptcy against the debtor, unless separate or distinct proceedings are instituted against him for that purpose. *Creditors v. Cozzens & Hall*, 3 B. R. 281; s. c. 2 W. J. 349; s. c. 16 Pitts. L. J. 236.

A party is liable for breach of an injunction after notice of its having been obtained, although the order has not been served upon him. All that is required is that the defendant should have knowledge of the order for the injunction, and the court may punish the violation of the order, though the injunction be not served, if it appear that the defendant knew of its existence. The belief that the order has been made and concealment to avoid service are sufficient. The right to indemnity for the damages occasioned by a breach of the injunction can not be in any way affected by the fact that the defendant acted under the advice of counsel. The fine should be equal in amount to the actual loss and expenses occasioned by his misconduct. *In re Feeny*, 4 B. R. 233; s. c. 2 L. T. B. 182.

The restraining power of the court is limited in point of time to the period of time expressed by the words "in the meantime," and those relate manifestly to the period of time between the entering of the order to show cause and the time specified therein for the hearing. The most extended construction that can be given to these words is that they are intended to cover the whole period up to such time as a hearing and adjudication shall be had upon the petition for an adjudication in bankruptcy. There is no warrant whatever for extending their meaning beyond that. Acts which are done after the restraining power of the injunction has ceased to operate do not make the parties liable for a contempt. *In re Moses*, 6 B. R. 181; *in re Mary Irving et al.*, 14 B. R. 289.

If the contempt committed by the bankrupt in collecting money from his debtors is not of a wilful character, it may be purged by turning everything over to the assignee, and will not then be visited by punishment, either personal or pecuniary. *In re J. P. Hayden*, 7 B. R. 192.

**Provisional Warrant.**—(c) The application for a provisional warrant should be made by a separate petition, supported by affidavits of persons having knowledge of the facts. A provisional warrant should not issue, except where all material facts are stated upon personal knowledge. *In re James A. McKibben*, 12 B. R. 97; *in re Joseph S. Hadley*, 12 B. R. 366.

The facts in support of a provisional warrant should be set forth in separate depositions. *In re Joseph S. Hadley*, 12 B. R. 366.

A recital in the order allowing the warrant, giving the date of the bankruptcy act incorrectly—1868 for 1867—is an immaterial mistake, and in no way affects the legality of the order. The recital of the title of the bankruptcy act in any proceeding is mere matter of form. The court takes judicial notice of the acts of Congress, and they need not be

set forth or specially referred to in any proceedings before it. In re Muller & Brentano, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33.

The order need not require the arrest of the debtor; the warrant may issue against the person and goods, or either of them. When the warrant is for the seizure of both the person and goods, it may be executed against both or either, as the petitioning creditors may direct. *Ibid.*

It is the duty of the marshal to take possession of "all the property and effects" of the debtor, in whosoever hands he may find them. This is a question of fact for the officer to determine for himself. If, by mistake or otherwise, he takes the goods of another, he is liable to the party injured on his official bond. The court must presume that the marshal obeys the writ and seizes nothing but the debtor's property. In re Muller & Brentano, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33; in re Marks, 2 B. R. 575; s. c. 1 C. L. N. 245; s. c. 16 Pitts. L. J. 12.

If the marshal, in the execution of the warrant, takes property belonging not to the bankrupt, but to another person, he is as much a wrongdoer as if acting in a private capacity, and the act differs not in its nature from any other trespass. *Marsh v. Armstrong*, 11 B. R. 125; s. c. 20 Minn. 81.

If the marshal under a provisional warrant seizes property which has been transferred in violation of the bankruptcy law, he is not liable to the transferee. *Stevenson v. McLaren*, 14 B. R. 403; s. c. 3 Cent. L. J. 478.

An attorney who directs the marshal to take goods under a warrant is not liable for trespass unless the direction in some degree wrought injury to the owner, or was in some degree the cause of such injury. *Rice v. Melendy*, 41 Iowa, 395.

If the preferred creditor was a witness in the proceedings to put the debtor into bankruptcy, he may be enjoined from prosecuting a suit subsequently instituted in a State court against the marshal for trespass in taking the property under the warrant. In re S. S. Miller, 6 Biss. 30.

The marshal, under the warrant, may hold possession of the property claimed by other persons when once in his possession, and may take possession of property not in the possession of the bankrupt, whether indemnified or not. If indemnified, it is made his duty to retain possession in the one case, and to take possession in the other, and he would be liable if he did not. If not indemnified, he is merely released from liability if he does not do it. His authority is derived from the warrant, and is as complete in the one case as in the other. With indemnity he is bound to exercise his authority; without it he may exercise it or not, at his option. He may take property from the possession of any person claiming to be a purchaser of the same. In re Briggs, 3 B. R. 638; s. c. 2 C. L. N. 218.

Property which does not belong to the debtor can not be taken under a provisional warrant, although the transfer may be void under the bankruptcy law. In re Geo. B. Holland, Jr., 12 B. R. 403; in re Harthill, 4 B. R. 392; s. c. 4 Ben. 448; s. c. 2 L. T. B. 181.

The court can not order the seizure of any property under a provisional warrant, except such as belongs to and is in the possession of the debtor. In re Geo. B. Holland, Jr., 12 B. R. 403.

The district court will not order a summary sale of property forcibly taken by the marshal, under the warrant, from the possession of a receiver appointed in a proceeding supplementary to an execution. *In re William W. Hulst*, 7 Ben. 17.

If the property of another is taken under the warrant, he may come into court promptly by petition, and ask to have the warrant set aside. The marshal's possession of the property having been taken under a warrant which was improperly issued against it, the property must be released from the marshal's possession, and must revert to the possession of the owner, and, if it has been sold, the proceeds must take the same course. The assignee must be left to take such affirmative proceedings against him in respect to the property as may be proper. Such proceedings must be taken by a pleading, making proper averments, and calling for an answer on which an issue raised can be tried, leading to a determination which the aggrieved party can have reviewed. The proceeds of property seized by the marshal improperly under the warrant, are not in court rightfully nor as belonging to the estate of the bankrupt, and can not be awarded according to the merits of the case between the creditors and the claimant. The bona fides of the purchase can not be tried upon such petition for restoration. *In re Harthill*, 4 B. R. 392; s. c. 4 Ben. 448; s. c. 2 L. T. B. 181; *Doyle v. Sharp*, 41 N. Y. Supr. 312.

The jurisdiction of the district court is not broad enough to authorize the marshal simply upon a provisional warrant to take from the possession of the sheriff property held by virtue of a levy of the final process of execution issued by a State court, and levied before the commencement of proceedings in bankruptcy. *Mollison v. Eaton*, 16 Minn. 426.

The exercise of the power to issue a provisional warrant to take possession of the debtor's property is one of great delicacy, and should not be called into action unless the court is satisfied that it is necessary for the protection of the property, and that it will inure to the benefit of the creditors. It is discretionary, but it is a legal discretion. The court must be satisfied that the disposition of the property is fraudulent, with the design to remove the same to the prejudice of the general creditors, and to defeat the provisions of the bankruptcy law. The removal of the goods of the debtor in the performance of an existing contract is not fraudulent. It is but the exercise of his legitimate right in carrying on his business, when for all the goods shipped he receives an equivalent in bills of exchange or money. Under such circumstances a provisional warrant will not be issued. *Bank v. Iron Co.*, 5 B. R. 491; s. c. 3 C. L. N. 402; s. c. 1 L. T. B. 272; s. c. 8 Phila. 171; s. c. 19 Pitts. L. J. 5.

The arrest of the debtor is in no manner for security or satisfaction of the petitioning creditor's debt. It is simply to secure the attendance of the debtor from time to time, as the court shall order, until the decision of the court on the petition or the further order of the court, and it is to that purpose and no other that bail is required of him. *In re Daniel Sheehan*, 8 B. R. 345.

The arrest of the debtor does not conflict with, and is not an evasion of the restriction against suing out execution for the satisfaction of the pe-

tioning creditor's judgment, where a writ of error is pending thereon, and a bond has been duly filed. *Ibid.*

If there are no other creditors, the execution of the provisional warrant may be stayed, if execution upon the judgment debt of the petitioning creditor has been stayed by suing out a writ of error and filing a bond. *Ibid.*

The second alternative clearly relates to a time within and not beyond that of the first, and appears to have been inserted in the statute with the object of allowing the debtor to be discharged, at the discretion of the court, before the adjudication of bankruptcy, not of keeping him in custody or attendance after that adjudication and during the pendency of the proceedings in bankruptcy. When the debtor has attended the court at the time of the order adjudging him a bankrupt, he has fulfilled the whole obligation imposed upon him by the statute. The obligation can not be extended or enlarged by the court, by substituting "and" for "or" in its order and warrant. *Usher v. Pease*, 12 B. R. 305; s. c. 116 Mass. 440.

An arrest can not be made under the warrant after the adjudication of bankruptcy. *Ibid.*

Bankruptcy court has full equitable powers over a proceeding in bankruptcy, and where it clearly appears to have been instituted for other purposes foreign to the legitimate objects of the act, it will be summarily dismissed. *In re Hamlin, Hale & Co.*, 16 B. R. 522.

An objection to a defect in an amended petition may be taken irrespective of the fact that former petition was open to the same objection, and such objection was not then raised. *In re The Western Savings & Trust Co.*, 17 B. R. 413.

ACT OF 1898, CH. 6, \* \* \* § 59. **Who May File and Dismiss Petitions.**— (a) Any qualified person may file a petition to be adjudged a voluntary bankrupt.

(b) Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

(c) Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

(d) If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the

pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

(e) In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

(f) Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

(g) A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.

ACT OF 1898, CH. 4, \* \* \* § 18. **Process, Pleadings, and Adjudications.**— (a) Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in courts of the United States.

(b) The bankrupt, or any creditor, may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow.

(c) All pleadings setting up matters of fact shall be verified under oath.

(d) If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this Act, and makes [*sic*] the adjudication or dismiss the petition.

(e) If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

(f) If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

(g) Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

ACT OF 1898, CH. 4, \* \* \* § 31. **Computation of Time.**—

(a) Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

§ 32. **Transfer of Cases.**—(a) In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

ACT OF 1867, § 5025. A copy of the petition and order to show cause shall be served on the debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode; or, if the debtor can not be found, and his place of residence can not be ascertained, service shall be made by publication in such manner as the judge may direct. No further proceedings, unless the debtor appears and consents thereto, shall be had until proof has been given, to the satisfaction of the court, of such service or publication; and if such proof is not given on the return day of such order, the proceedings shall be adjourned, and an order made that the notice be forthwith so served or published. <sup>1</sup>And if, on return day of

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<sup>1</sup> So amended by act of June 22, 1874, ch. 390, § 13, 18 Stat. 182.

the order to show cause as aforesaid, the court shall be satisfied that the requirement of section five thousand and twenty-one [thirty-nine] of said act, as to the number and amount of petitioning creditors, has been complied with, or if within the time provided for in section five thousand and twenty-one [thirty-nine] of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one-fourth in number of the creditors, and one-third in the amount of the provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise it shall dismiss the proceedings, and, in cases hereafter commenced, with costs.

Statute revised — March 2, 1867, ch. 176, § 40, 14 Stat. 536. Prior Statute — April 4, 1800, ch. 19, § 3, 2 Stat. 22.

**Service of Process and Further Proceedings.**—Where a corporation has been dissolved by means of an order passed by a State court, in an action instituted by the State attorney-general, the case is one where the debtor proceeded against can not be found, on account of the dissolution, and the service of the order to show cause should be made by publication. *In re Washington Marine Ins. Co.*, 2 B. R. 648; s. c. 2 Ben. 292.

Service is to be deemed to be made personally on a corporation when it is effected in the only mode in which service can be made on such artificial persons, viz: by delivering the order to its head or principal officers. The "usual place of abode" in regard to corporations means their principal place of business. *In re California Pacific R. R. Co.*, 11 B. R. 193; s. c. 3 Saw. 240.

A service of the order to show cause upon a corporation is sufficient, if it would be valid and effectual if made in a suit at common law in the circuit court. *Ibid.*

When the order directs that a copy of the petition and order shall be served upon the president of a corporation, if the president can not be found, a new order may be issued, upon the filing of an affidavit setting forth such absence, directing the service to be made on the cashier, and such service will be valid. *Platt v. Archer*, 6 B. R. 465; s. c. 9 Blatch. 559.

The words "if such debtor can not be found" mean if he can not be found within the jurisdiction of the court. The marshal is not compelled to serve him in another jurisdiction, even when he knows precisely where he may be found. The words "not found" have a well-settled technical meaning, and mean not found in the jurisdiction of the court. If the debtor can not be found within the jurisdiction of the court, that does not authorize service out of the jurisdiction. In such case other modes of service must be resorted to. A corporation can have no legal existence out of the bounds of the sovereignty by which it was created. It must dwell in the place of its creation. Service upon an officer of the cor-



poration out of the district and State, or service at the supposed residence of the corporation, also out of the district and State, is defective and invalid. The fact that the corporation is also chartered by several States does not make it one corporate body on which service can be made at its residence in any one of those States. If the place of the debtor's residence can not be ascertained, as if there is no office of the corporation within the district, and no person representing the corporation, on whom service can properly be made, can be found in the district, then service by publication may and should be resorted to. *Ala. & Chat. R. R. Co. v. Jones*, 5 B. R. 97; *Stuart v. Aumueller*, 8 B. R. 541.

The act is entirely silent as to the place of service. The mode only is designated. The act authorizes service by publication only when the party to be served can not be found or his place of residence ascertained. When the debtor is found, personal service may be made upon him out of the district. *Stuart v. Hines*, 6 B. R. 416; s. c. 33 Iowa, 60; s. c. 5 L. T. B. 46.

The act nowhere provides by whom a personal service shall be made. The fact that the act makes special provision for the service of certain processes by the marshal, and remains entirely silent as to the person by whom the order to show cause shall be served, is a strong argument against the position that such order can be served by the marshal only. *Expressio unius est exclusio alterius*. The order to show cause is not directed to the marshal, but to the debtor, and may be served by the marshal or any other person. *Ibid*.

The prohibition of "further proceedings" is intended of proceedings upon the petition and against the debtor, and not of collateral proceedings by or against third persons, or even the debtor. *In re Muller & Brentano*, 3 B. R. 329; s. c. 1 Deady, 513; s. c. 2 L. T. B. 33.

After the filing of the petition, depositions to be used in the cause may be taken at any time, before any register, upon service of notice thereof on the opposite party, even though the order to show cause has not been served upon the debtor. *In re Dean & Garrett*, 2 B. R. 80.

**Requisite Number.**—It is a matter of inquiry for the court to ascertain and adjudge whether the requisite number of creditors have joined in the proceedings. The reason for this is very obvious. This provision is designed to guard against collusive proceedings, and makes it the duty of the court to investigate and find whether the requisite number of creditors have joined in the proceedings, and whether the proceedings are in good faith. The naked allegation in the petition, although admitted by the debtor, does not seem to be enough, but the court must be satisfied that the requisite number of creditors have united in the petition, and must also be satisfied that the admission of such fact, if admitted by the debtor, is made in good faith. *In re J. Young Scammon*, 10 B. R. 66; s. c. 6 Biss. 130; *in re Joliet Iron & Steel Co.*, 10 B. R. 60; s. c. 1 A. L. T. (N. S.) 372; s. c. 10 A. L. J. 29; s. c. 6 C. L. N. 328; s. c. 22 Pitts. L. J. 207; *in re Isaac Scull*, 10 B. R. 165; s. c. 7 Ben. 371; s. c. 10 A. L. T. (N. S.) 416; *in re James R. Keeler*, 10 B. R. 410; s. c. 1 A. L. T. (N. S.) 422; s. c. 20 I. R. R. 82.

When the court has adjudged that the requisite proportion of creditors have joined in an involuntary petition, the judgment is final, not only as respects the debtor, but as respects all his creditors, and will not be re-examined by the district court except upon an allegation of fraud or bad faith. In re Wm. B. Duncan, 14 B. R. 18; in re John H. McKinley, 7 Ben. 562; in re J. Funkenstein, 14 B. R. 213; s. c. 3 Saw. 605.

Where the summons is by publication, the adjudication will not be set aside on the application of the debtor, in the absence of fraud or collusion. In re John H. McKinley, 7 Ben. 562.

Where the debtor neither admits nor denies the allegation, but merely makes default, the adjudication will not be set aside on the application of creditors, unless bad faith or collusion is alleged. In re J. Funkenstein, 14 B. R. 213; s. c. 3 Saw. 605.

After an adjudication of bankruptcy no inquiry can be made into the truth of an affidavit filed to show that the requisite proportion of creditors have united in the petition, unless fraud or bad faith is alleged. In re Wm. B. Duncan, 14 B. R. 18.

The co-operation of the debtor in securing creditors by lawful means to unite in an involuntary petition, is no ground for setting aside an adjudication. *Ibid.*

ACT OF 1898, CH. 4, § 18. \* \* \* **Trials.**—(e) If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

(See *post*, page 313.)

Adjudication by default can only be opened at instance of a party to the default. In re E. L. Matot & Co., 16 B. R. 485.

§ 19. **Jury Trials.**—(a) A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

(b) If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of

parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

(c) The right to submit matters in controversy, or an alleged offense under this Act, to a jury shall be determined and enjoyed, except as provided by this Act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

§ 20. **Oaths, Affirmations.**— (a) Oaths required by this Act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

(b) Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

CH. 1, \* \* \* SEC. 1. **Oath.**—(17) Oath shall include affirmation.

ACT OF 1867, § 5026. On such return day, or adjourned day, if the notice has been duly served or published, or is waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demands in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of the alleged bankruptcy.<sup>1</sup> Or, at the election of the debtor, the court may, in its discretion, award a *venire facias* to the marshal of the district returnable within ten days before him, for the trial of the facts set forth in the petition, at which time the trial shall be had, unless adjourned for cause. And unless, upon such hearing or trial, it shall appear to the satisfaction of said court, or of the jury, as the case may be, that the facts set forth in said petition are true, or if it shall appear that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens was the sole ground of the proceeding, the proceeding shall be dismissed, and the respondent shall recover costs; and all proceedings in bankruptcy may be discontinued on reasonable notice and hearing, with the approval of the court,

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<sup>1</sup> So amended by act of June 22, 1874, ch. 390, § 14, 18 Stat. 182.

and upon the assent, in writing, of such debtor and not less than one-half of his creditors, in number and amount; or in case all the creditors and such debtor assent thereto, such discontinuance shall be ordered and entered; and all parties shall be remitted, in either case, to the same rights and duties existing at the date of the filing of the petition for bankruptcy, except so far as such estate shall have been already administered and disposed of. And the court shall have power to make all needful orders and decrees to carry the foregoing provision into effect. If the petitioning creditor does not appear and proceed on the return day, or adjourned day, the court may, upon the petition of any other creditor to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.

Statute revised — March 2, 1867, ch. 176, §§ 41, 42, 14 Stat. 537. Prior Statutes — April 4, 1800, ch. 19, § 3, 2 Stat. 22; Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440.

**Appearance and Pleadings.**—A debtor who has not been served with the order to show cause may appear by attorney. It is not necessary that he should appear in person. *In re Weyhausen et al.*, 1 Ben. 397.

A party who appears without an order to show cause, and confesses or puts in a denial of the alleged acts of bankruptcy, and demands a trial, submits himself to the jurisdiction of the court. *In re Moses A. McNaughton*, 8 B. R. 44.

If a corporation, subject to the provisions of the bankruptcy act, is in existence when the petition against it is filed, and when the proper papers are served on its proper officer, a decree dissolving the corporation made after such service and before the return day can not oust the jurisdiction of the bankruptcy court to proceed on the return day to an adjudication of bankruptcy. The papers having been served on an officer of the corporation while the corporation was in being, the order of adjudication is substantially a proceeding in rem, and not one in personam. The proceeding in bankruptcy does not abate by the dissolution of a corporation so as to be incapable of being proceeded with thereafter. *Platt v. Archer*, 6 B. R. 465; s. c. 9 Blatch. 559.

Where the parties appear on the return day or adjourned day, and join issue, and no further proceeding or adjournment is had, the matter is to be considered as pending from day to day. In such case each subsequent day is an adjourned day to all intents and purposes. *In re William Buchanan*, 10 B. R. 97.

If the petitioning creditor and the debtor appear on the return day, the want of a formal adjournment does not terminate the proceedings, for such an adjournment is not necessary to keep them alive. *Ibid.*

After the return day, an answer can only be filed by special leave of the court. *In re Gebhardt*, 3 B. R. 268. *Vide in re Isaac Scull*, 10 B. R. 165; s. c. 7 Ben. 371; s. c. 1 A. L. T. (N. S.) 416.

When the allegations of the petition are not sufficiently distinct, the debtor may decline to answer on that ground, and ask that they be made more definite and certain, or be stricken out. *In re Randall & Sunderland*, 3 B. R. 18; s. c. 1 Deady, 557; s. c. 2 L. T. B. 69.

When the allegations of the petition are insufficient, the objection may be taken by a demurrer, but a demurrer is not a proper mode to raise a question as to the sufficiency of the allegations on the ground that they are not precise and definite. *Orem & Son v. Harley*, 3 B. R. 263.

A plea in abatement of the pendency of other proceedings in bankruptcy instituted by the petitioning creditor must show jurisdiction in the court whose proceedings are so set up. *In re John T. Balch*, 3 McLean, 221.

A general demurrer which is good only as to one of the several acts of bankruptcy alleged in the petition can not be sustained. *In re Kenyon & Fenton*, 6 B. R. 238; s. c. 1 Utah Ter. 47.

The debtor may at the same time demur to the sufficiency of the allegations of the petition, and file an answer denying the acts of bankruptcy. *In re Nickodemus*, 3 B. R. 230; s. c. 1 L. T. B. 140; s. c. 2 C. L. N. 49; s. c. 16 Piffs. L. J. 233.

Objections to the maintenance of the proceedings may be made by a motion to set aside the petition. *In re Melick*, 4 B. R. 97.

When a motion to dismiss has been filed, attention must first be given to that, unless it is waived. *Hunt v. Pooke*, 5 B. R. 161.

On the overruling of a demurrer, the court may adjudge the debtor a bankrupt on the allegations of the petition, and he will have no legal right to complain. It is in the discretion of the court to say whether he shall make a new choice of defense or not. *In re A. Benham*, 8 B. R. 94.

If the debtor demurs to the petition on the return day, and the hearing is postponed to a subsequent day, he thereby waives his right to demand a jury trial upon the overruling of the demurrer. *Ibid*.

If the petition sets forth an act of bankruptcy on the part of one of the debtors, but not of all, it may, when a demurrer is sustained, be retained as to him and dismissed as to the others. *In re Redmond & Martin*, 9 B. R. 408.

The questions at issue on the petition and the denial of bankruptcy are questions solely between the petitioning creditor and the debtor, with which no outside party, sustaining merely the relation of a person who claims to be a creditor, can be permitted to interfere. A mere creditor can have no concern in the matter before adjudication. *In re Boston R. R. Co.*, 5 B. R. 232; *in re Bush*, 6 B. R. 179; s. c. 6 W. J. 276; *Dutton v. Freeman*, 5 Law Rep. 447.

Any creditor has a standing in court to be heard touching the proceedings in any case prior to the adjudication, if he shows by proof satisfactory to the court, that he is in fact a creditor, and that his interests will be affected by the adjudication. A formal and technical proof is not necessary. A petition by an alleged creditor against his debtor to compel a submission of his estate to the bankrupt court is not a mere suit *inter partes*. It rather partakes of the nature of a proceeding *in rem*, in which

every actual creditor has a direct interest. The proceeding is summary, and in a high degree informal, and it should be free from technical embarrassment. No one is entitled to be heard thereon who has no interest to protect. To justify an intervention the object or purpose disclosed must be one which in a legal sense is meritorious and not purely officious; therefore the facts alleged as ground of intervention must be such as entitle the applicant to consideration. The court must be able to see that the intervention may serve some useful purpose, either in protecting the rights of the applicant, or those of the creditors at large. *In re Boston R. R. Co.*, 6 B. R. 209, 222; s. c. 9 Blatch. 101, 409; *Bonnet v. James*, 1 N. Y. Leg. Obs. 310; *in re Heusted*, 5 Law Rep. 510; *Clinton v. Mayo*, 12 B. R. 39.

No creditor can appear and contest the proceedings until he proves his debt. *Dutton v. Freeman*, 5 Law Rep. 447.

The creditor who is charged by the petition with receiving a preference may appear and oppose the adjudication. *In re Heusted*, 5 Law Rep. 510; *Clinton v. Mayo*, 12 B. R. 39.

A petitioning creditor who has filed a prior petition in another court may intervene. *In re Boston R. R. Co.*, 6 B. R. 209; s. c. 9 Blatch. 101.

A creditor who has received a mortgage which is liable to be assailed as a preference may intervene. *In re Walter S. Derby*, 8 B. R. 106; s. c. 6 Ben. 232.

An attaching creditor may intervene and oppose the adjudication. *In re S. Mendelsohn*, 12 B. R. 533; s. c. 3 Saw. 343; *in re Hatje*, 12 B. R. 548; s. c. 6 Bliss. 436; *in re Francis M. Jack*, 13 B. R. 296; s. c. 1 Woods. 549; *in re C. G. Scrafford*, 14 B. R. 184; s. c. 15 B. R. 104; s. c. 4 Cent. L. J. 19.

An attaching creditor may intervene to contest an adjudication upon the merits as well as to claim that the court has no jurisdiction of the case. *In re Elias G. Williams*, 14 B. R. 132.

An attaching creditor who intervenes to oppose an adjudication may take advantage of any defense available to the debtor. *Ibid.*

An attaching creditor may contest the adjudication on the ground that the proper proportion of creditors has not joined in the petition. *In re C. G. Scrafford*, 14 B. R. 184; s. c. 15 B. R. 104; s. c. 4 Cent. L. J. 19.

An objection to defects in the petition may be made even at the hearing. The objection is in the nature of a motion in arrest of judgment. *In re Waite & Crocker*, 1 B. R. 373; s. c. Lowell, 207.

The process, pleadings, and proceedings in a case of involuntary bankruptcy must be regarded as governed and controlled by the rules and regulations prescribed in the trial of civil actions at common law. *Ins. Co. v. Comstock*, 8 B. R. 145; s. c. 16 Wall. 258.

A reasonable construction requires the debtor's allegations to be reduced to writing, and in such form as to raise an issue in analogy to issues in other cases triable by a jury. The word "allegations" is used in the sense of pleadings, as meaning a formal statement of the acts of bankruptcy in the petition, and a like formal defense of the debtor thereto, either a general denial which will put in issue all the facts stated in the petition, or a statement of any matters in avoidance according to the rules governing pleadings in common-law cases. *In re Sutherland*, 1 B. R. 531; s. c. 1

Deady, 344; in re Alexander Findlay, 9 B. R. 83; s. c. 5 Biss. 480. Contra, in re Heydette, 8 B. R. 333.

Form No. 61 is the form of the order to be entered by the court. It is not an act or allegation of the debtor, but is an order of the court based upon the allegation of the debtor previously presented or communicated to the court in some form, either orally or in writing. In re Alexander Findlay, 9 B. R. 83; s. c. 5 Biss. 480; in re Sutherland, 1 B. R. 531; s. c. 1 Deady, 344. Contra, Phelps v. Classen, 3 B. R. 87; s. c. 1 Wool. 204; in re Dunham & Orr, 2 B. R. 17; s. c. 2 Ben. 488; s. c. 1 L. T. B. 89; in re Heydette, 8 B. R. 333; in re Hawkeye Smelting Co., 8 B. R. 385.

The answer should be made under oath. The general rule in all courts is to require a pleading or petition to be answered in as solemn a manner as it is required to be made. In re Alexander Findlay, 9 B. R. 83; s. c. 5 Biss. 480. Contra, in re Gebhardt, 3 B. R. 268; in re Heydette, 8 B. R. 333.

The objection that the petition is not duly signed and verified is waived by putting in a denial of the act of bankruptcy, and a demand for a trial. By such an act the debtor waives not only the necessity of an order to show cause, but the necessity of proof of the authority of the person signing the petition, and, in fact, of any verification whatever. Proof of the authority of a person signing a creditor's petition in a representative capacity, and a verification of the petition, like the accompanying proof of the petitioning creditor's debt and deposition as to the alleged act of bankruptcy, are requisite only to authorize the making of an order to show cause. When that is done their office is accomplished, and they never can be and never are of any other or further use in the case. In re Moses A. McNaughton, 8 B. R. 44.

The debtor may deny that the petitioner is a creditor, and by proofs maintain such denial. The act provides that if the debtor proves that the facts set forth in the petition are not true, the proceedings shall be dismissed. The facts set forth in the petition are all those which are necessary to make it the duty of the court to adjudge the debtor a bankrupt; that is to say, there must be before the court a creditor with a provable debt to the required amount, and there must be established an act of bankruptcy within six months before the filing of the petition. It must also be alleged and shown that the debtor owes provable debts to the amount of \$300. Unless all these concur, the petitioner has no right to prosecute the petition, and however he may be able to prove, or does prove, the commission of acts of bankruptcy, he is not by law clothed with the right or power to begin or sustain a prosecution or ask a decree. In re Cornwall, 6 B. R. 305; s. c. 9 Blatch. 114; in re Oulmette, 3 B. R. 566; s. c. 1 Saw. 47.

The debt and the act of bankruptcy taken together constitute the cause of action. The defense set up may go to either or both of these matters, and there may be several defenses to each, but they must be separately stated — that is, so that each one will stand or fall by itself without the aid of the other. In re Oulmette, 3 B. R. 566; s. c. 1 Saw. 47.

It is nowhere expressly or impliedly said that one who can furnish proof which, unexplained and uncontradicted, would show *prima facie* that he is

a creditor, may file a petition, or that a party may be adjudged a bankrupt upon such petition. The objection that the petitioner is not a creditor goes not only to his disability, but to the jurisdiction of the cause. It would be monstrous injustice if parties were not only liable to be proceeded against, but must necessarily be adjudged bankrupts, submit to a warrant and be dispossessed of all their property at the instance of any one and every one who either dishonestly or by mistake was able to present, by petition and affidavits, *prima facie* evidence of a debt, when in truth none existed. It might often happen that the only act of bankruptcy alleged depended for its character upon the very question whether any debt was owing to the petitioner; and if a mere *prima facie* case shown by the petition precluded further inquiry on that question, a party might be declared a bankrupt, his property be subjected to administration under the law, and, in the end, it would appear that the petitioner, having no debt, no act of bankruptcy had been committed, and the whole proceeding, injurious as it must be, was wholly groundless. *In re Cornwall*, 6 B. R. 305; s. c. 9 Blatch. 114.

When the petition sets forth the several acts of bankruptcy alleged conjunctively, the denial in the answer should be in the disjunctive, and in such form as to fully deny either of the intentions imputed to the debtor. *In re S. T. Smith*, 3 B. R. 377; s. c. 4 Ben. 1; s. c. 1 L. T. B. 147.

A proceeding in bankruptcy is not an action to collect a debt, but to procure an adjudication of bankruptcy, and, therefore, a plea of tender of the amount due the petitioner can, under no circumstances, be a defense to it. The allegation of the petition is, that the party is not only indebted to the petitioner, but that he has committed an act of bankruptcy. To this it is no sufficient answer to allege a tender of the amount due. The court will not presume that the petitioner is the only creditor. If, in fact, there are no other creditors, the plea should contain an allegation to that effect. A plea containing such an allegation would not be a good defense. *In re Ouimette*, 3 B. R. 566; s. c. 1 Saw. 47.

If the debtor proves that there are no other creditors to the requisite amount to proceed against him under the bankruptcy act, and tenders the amount due on the petitioning creditor's claim, together with the costs of the proceedings, the proceedings will be dismissed. *In re Daniel Sheehan*, 8 B. R. 353.

If the tender of payment does not include the costs, the debtor must pay full costs, as upon an adjudication, after hearing, if the proceedings are dismissed. *Ibid.*

If the petitioning creditor, after the filing of the petition, obtains an order, in the suit instituted in a State court for the arrest of the bankrupt and another, but instructs the sheriff not to arrest the bankrupt, a voluntary surrender and giving of bail in that action will not be a sufficient ground for dismissing the petition, although the debt which constitutes the cause of action in both cases is the same. A person proceeded against as a bankrupt does not by voluntarily placing himself under arrest, or in jail, or in any other place of confinement, remove himself from the effect of the bankruptcy law. *In re George Merkle*, 5 Ben. 8.



The debtor may set up a claim for unliquidated damages arising out of a contract, as a set-off or counterclaim against the petitioning creditor's debt. In *re Osage V. & S. K. R. R. Co.*, 9 B. R. 281; s. c. 1 Cent. L. J. 33.

Where a debtor has committed an act of bankruptcy, he cannot discharge himself from his legal liability for such act by subsequent rescission or undoing thereof. In *re Thomas Ryan*, 2 Saw. 411.

A feme covert may avail herself of her coverture to defeat the debt which is the basis of proceedings in bankruptcy. In *re Schlichter et al.*, 2 B. R. 336; in *re Howland*, 2 B. R. 357; in *re Rachel Goodman*, 8 B. R. 380; s. c. 5 Bliss. 401.

When a note is given by a feme covert, it must appear on the face that it was given with the intent to bind her separate estate, or there must be allegations that it was given for the benefit of her separate estate, or in the course of trading transactions which she is authorized to engage in by law. In *re Howland*, 2 B. R. 357; in *re Schlichter*, 2 B. R. 336.

A married woman, living separate and apart from her husband, may, under the laws of California, contract a valid debt, which can be enforced against her. In *re Julia Lyons*, 2 Saw. 524; s. c. 1 A. L. T. (N. S.) 167.

A person who is so unsound of mind as to be wholly incapable of managing his affairs can not, in that condition, commit an act for which he can be forced into bankruptcy by his creditors against the objection of his guardian. In *re Marvin*, 1 Dillon, 178; s. c. 3 C. L. N. 394; in *re Mitzel*, 3 Cent. L. J. 555.

The denial of a fraudulent intent to give a fraudulent preference involves a confession of an intent to give a preference, though not a fraudulent one. Such a preference is an act of bankruptcy. In *re R. Sutherland*, 1 B. R. 531; s. c. 1 Deady, 344.

A corporation by appearing and answering a petition thereby admits that it may be proceeded against in bankruptcy, and can not afterward object that the petition does not allege that it is a moneyed, business or commercial corporation. In *re Oregon B. Printing Co.*, 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.

Irrelevant or immaterial matter in a pleading may be stricken out, although it is a denial of an immaterial allegation in a prior pleading. In *re Oregon B. Printing Co.*, 13 B. R. 199; s. c. 14 B. R. 405; s. c. 3 Saw. 614.

When the case is brought to a hearing on petition and answer, and the answer denies material averments contained in the petition, the averments must be regarded as disproved, unless they are conclusively presumed by law. *Wells et al. (ex parte H. B. Claffin & Co.)*, 1 B. R. 171; s. c. 1 L. T. B. 20; s. c. 7 A. L. Reg. 163.

It is a well-settled rule of pleading, that a traverse or denial must not be taken on a mere matter or conclusion of law, for the effect would be to submit the question of law to the jury rather than to the court. But when the conclusion is a mixed one of law and fact, then it is clearly traversable, and the issue raised thereby triable by a jury, under the direction of the court as to the law. The sale of his property by a debtor is not necessarily an act of bankruptcy. It depends upon the intent with which it is done, and as this intent is not a mere conclusion of law, but of law and fact

compounded, it may be traversed or denied. In *re Silverman*, 4 B. R. 523; s. c. 2 Abb. C. C. 243; s. c. 1 Saw. 410.

Although the intent to prefer is a necessary ingredient in the alleged act of bankruptcy, yet if a preference is a necessary consequence of the facts admitted in the answer, the law conclusively presumes the intent to prefer, and the intent can not be denied and tried as an issue of fact. When, by law, the consequences must necessarily follow the act done, the presumption is ordinarily conclusive, and can not be rebutted by any evidence of intention. In *re Silverman*, 4 B. R. 523; s. c. 2 Abb. C. C. 243; s. c. 1 Saw. 410; in *re S. T. Smith*, 3 B. R. 377; s. c. 4 Ben. 1; s. c. 1 L. T. B. 147; in *re Thomas Ryan*, 2 Saw. 411.

An allegation in the answer as to the value of property which the debtor owns and holds, is simply surplusage and immaterial, and ought to be stricken out, but it is no ground for a demurrer. A plea of a tender of the petitioner's debt may be stricken out as immaterial. Objections to the sufficiency of an answer may be taken by demurrer. When a demurrer to an answer is overruled, the petitioner may be permitted to reply on payment of costs. In *re Oulmette*, 3 B. R. 566; s. c. 1 Saw. 47.

If the denial of the allegation in the petition is not in proper form, the proper course is to move to strike the paper from the file, and to vacate the subsequent record and order made thereon. In *re Heydette*, 8 B. R. 333.

When the answer consists merely of the denial contained in Form No. 61, no replication is needed. In *re Dunham & Orr*, 2 B. R. 17; s. c. 2 Ben. 488; s. c. 1 L. T. B. 89.

If the petitioning creditor is declared a bankrupt, his assignee may be substituted as a petitioner in his place, and prosecute the petition. In *re B. F. Jones*, 7 B. R. 506.

The remedies of an assignee under the law are regulated by the same provisions that control the rights of other parties. He can not in any way secure from an insolvent debtor a preference over other creditors for the estate which he is administering. He must adopt the only remedy which the law allows him in the performance of his duty to collect the assets of the bankrupt, and that is the filing of a petition in bankruptcy against the bankrupt's insolvent debtor. *Ibid.*

A motion for an adjudication upon or notwithstanding the respondent's answer may be denied, and the case allowed to proceed to trial upon the merits. In *re Safe D. & S. Inst.*, 7 B. R. 392.

A jury can not be demanded on any day but the return day. By consent of parties, an adjourned day may be held to be the same in all respects as the return day. In *re G. & H. Pupke*, 1 Ben. 342; in *re Gebhardt*, 3 B. R. 268; in *re Sherry*, 8 B. R. 142; *Clinton v. Mayo*, 12 B. R. 39.

If the petition was not signed originally by the requisite number of creditors, and was only made complete by the filing of an intervening petition after the return day, the debtor may demand a jury trial on the day when such intervening petition is filed. In *re J. M. Kintner*, 22 Pitts. L. J. 150.

If the debtor demand a jury trial, the court may issue a special venire

to summon a jury to try the issue. In *re Alexander Findlay*, 9 B. R. 83; s. c. 5 Biss. 480; in *re Hawkeye Smelting Co.*, 8 B. R. 385.

The district court may impanel a jury to try the issue of bankruptcy *vel non* during a vacation as well as in term time. *Lehman v. Strassberger*, 2 Woods, 554.

**Evidence.**—The burden of proof rests upon the creditor. *Brock v. Hoppock*, 2 B. R. 7; s. c. 2 Ben. 478; in *re Randall & Sunderland*, 3 B. R. 18; s. c. 1 Deady, 557; s. c. 2 L. T. B. 69; in *re Leonard*, 4 B. R. 563; s. c. 2 L. T. B. 177; in *re Price & Miller*, 8 B. R. 514; in *re Jelsh & Dunnebacke*, 9 B. R. 412; in *re Scudder, Wilcox & Ogden*, 1 N. Y. Leg. Obs. 325; in *re Oregon B. Printing Co.*, 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.

A paper sworn to and filed by an officer of a corporation is competent evidence against it, but is not conclusive. In *re Oregon B. Printing Co.*, 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.

A defense which has been stricken out of the case may be given in evidence as an admission. *Ibid.*

The letters of the debtor are admissible in evidence against an attaching creditor who intervenes to oppose an adjudication. In *re Hatje*, 12 B. R. 548; s. c. 6 Biss. 436.

The admissions of the debtor made in the course of an examination upon supplemental proceedings, when duly authenticated under section 905, are admissible in evidence against him. In *re Rooney*, 6 B. R. 163.

The district court has plenary power to compel the examination of all papers and books of the debtor, or in his possession, if pertinent to the issue and required for the protection of the rights and interest of the petitioning creditor. In *re Mendenhall*, 9 B. R. 285.

The provisions of section 724 are peculiarly stringent, and when a court is asked to enforce it, a plain case must be presented for its interposition. There is no limitation in regard to the kind of action at law which must be on trial in order to entitle either party to the benefit of the statute. A proceeding in bankruptcy is within its purview. *Ibid.*

When the debtor omits to call a witness who is conversant with all the facts and might explain doubtful points, the presumption is against him. *Curran v. Munger*, 6 B. R. 33; in *re Thomas Woods*, 7 B. R. 126; s. c. 29 Leg. Int. 236; s. c. 20 Pitts. L. J. 21.

If the counsel for the petitioner omits to prove a particular fact, under the impression that it has been proven, the court may allow him to supply the omission even after the commencement of the argument of the case. In *re Munn*, 7 B. R. 468; s. c. 3 Biss. 442.

When the evidence all points one way, and there is no question of fact to be submitted, the court may direct the jury to render their verdict for the party entitled to it. *Hardy v. Clark*, 3 B. R. 385; s. c. 1 L. T. B. 151; s. c. 3 L. T. B. 11; s. c. 17 Pitts. L. J. 61; s. c. 2 C. L. N. 121.

Under the issue made by the denial of bankruptcy, the debtor can introduce proof to contradict all the material allegations of the petition. Evidence in regard to the indebtedness is admissible under the issue. In *re Skelley*, 5 B. R. 214; s. c. 3 Biss. 260.

The creditor must establish his debt before proceeding to show acts of bankruptcy. *Brock v. Hoppock*, 2 B. R. 7; s. c. 2 Ben. 478; *Moore v. National Exchange Bank of Columbus*, 1 B. R. 470; s. c. 2 Bond, 170; s. c. 1 L. T. B. 74; *Foster v. Remick*, 1 N. Y. Leg. Obs. 232; s. c. 5 Law Rep. 406.

Quære, When the debtor intends to deny that he owes the petitioning creditor debts to the requisite amount, ought he not to raise that question before going to the jury on the alleged acts of bankruptcy? *Phelps v. Classen*, 3 B. R. 87; s. c. 1 Wool. 204; *Foster v. Remick*, 1 N. Y. Leg. Obs. 232; s. c. 5 Law Rep. 406.

While the court may in a case where the facts are undisputed take a question from the jury and dispose of it as a matter of law, and will generally do so in a case entirely free from doubt, yet whether the court will do so or not is in all cases a matter of discretion, and it is not error to send it to the jury however clear the case may be. *In re Jelsh & Dunnebacke*, 9 B. R. 412.

When the petition is against two partners, one of whom is in default, and the other of whom contests and succeeds, the petition must be dismissed. Both parties must be found guilty under the act before judgment can be entered against the partnership. *Doan v. Compton & Doan*, 2 B. R. 607.

If the petitioner proceeds against joint debtors, he can not prevail even as to one by proving the commission of an act of bankruptcy by him. *James v. Atlantic Delaine Co.*, 11 B. R. 390.

The motive of the petitioner in prosecuting the petition, or the co-operation of one of the debtors, or his motive therefor, can have no possible effect in determining the quality of the acts alleged to be acts of bankruptcy, or the legal consequence of such acts. Evidence tending to show collusion between them should be rejected. *Hardy v. Binninger*, 4 B. R. 262; s. c. 7 Blatch. 262.

The petitioning creditor is confined to the act of bankruptcy alleged in the petition. *In re James W. Sykes*, 5 Biss. 113.

The debtor can not be adjudicated bankrupt for committing an act of bankruptcy which is not specially set forth in the petition. *In re Potts & Garwood*, *Crabbe*, 469; *in re J. A. & H. W. Shouse*, *Crabbe*, 482; *in re James W. Sykes*, 5 Biss. 113.

**Estoppel.**—The pendency of a suit in a court of law on a distinct and independent demand is not a bar to the filing of a proceeding in bankruptcy. The petitioning creditor may proceed to an adjudication while the suit is pending, but the suit will be annulled and surrendered by an adjudication. It is true that the petitioning creditor can not carry on the two proceedings at the same time, at law for one part of his demand and in bankruptcy for another, but there is no reason why he should be required to abandon his suit commenced before the filing of the petition, until it is determined whether the petition can be sustained. *Everett v. Derby*, 5 Law Rep. 225.

The institution of an action at law and the recovery of a judgment therein after the filing of the petition, is no ground for dismissing the proceedings. *Van Kleeck v. Tharber*, 1 Penn. L. J. 402.

A plaintiff who institutes proceedings in bankruptcy after the commencement of his action, can not have the suit postponed until the proceedings in bankruptcy are terminated. *Stewart v. Sonneborn*, 51 Ala. 126.

A creditor who has given his assent to a transaction is estopped from urging it as an act of bankruptcy. *Perry v. Longley*, 1 B. R. 559; s. c. 1 L. T. B. 34; s. c. 7 A. L. Reg. 429; in re Schuyler, 2 B. R. 549; s. c. 3 Ben. 200; s. c. 2 L. T. B. 85.

But a creditor is not estopped from setting up an assignment as an act of bankruptcy, because he has delayed filing his petition for seventeen days after it was executed, and sought information concerning the estate, and offered to sell his claim, and proposed to assent to it, if the debtor and the assignee would surrender the property assigned, and commit its disposal and management to some person more satisfactory to him. *Spicer v. Ward*, 3 B. R. 512.

If the petitioner has advised the making of an assignment, or after its execution has expressly given his assent to it he will be precluded from insisting on it as an act of bankruptcy. But a motion to have the penalty of the assignee's bond increased is clearly no approval of, or assent to, the assignment. *Perry v. Longley*, 1 B. R. 559; s. c. 1 L. T. B. 34; s. c. 7 A. L. Reg. 429.

If the petitioning creditor is a stockholder in a corporation against which he holds the claim, and is present at a meeting when a resolution is passed to give a security, it is his duty to protest, and see if the stockholders deliberately intend to commit an act of bankruptcy. His failure to protest will bind him, whichever way he may vote upon the question. In re Massachusetts Brick Co., 5 B. R. 408; s. c. 4 L. T. B. 220.

A creditor who has signed a composition agreement for an extension of credit, containing a stipulation that it shall not be binding unless it is signed by all the creditors, can not file a petition until a sufficient time elapses to ascertain whether all the creditors will become parties thereto. In re Potts & Garwood, Crabbe, 469.

If a creditor, after a proposition of compromise has been submitted to him, attaches the property of his debtor, this is such an unequivocal act that his dissent may reasonably be presumed, and a creditor who has signed the composition may then file a petition. *Ibid.*

Creditors who have taken possession of the entire property of a debtor under a general assignment, or bill of sale intended to prefer them, can not set up the nonpayment of a note as an act of bankruptcy. In re Elias G. Williams, 14 B. R. 132.

Creditors who have obtained a preference by a bill of sale from the debtor, are estopped to set up the execution of the same as an act of bankruptcy. *Ibid.*

During the pendency of proceedings in involuntary bankruptcy the debtor can not be adjudged a bankrupt on a voluntary petition filed after the filing of the petition of the creditors against him. In re R. R. Stewart, 3 B. R. 108. Contra, in re Philemon Canfield, 1 N. Y. Leg. Obs. 234; s. c. 5 Law Rep. 415.

If all the creditors prove their claims under the subsequent voluntary pe-

tion, they thereby waive the right to insist upon going back and proceeding under the prior involuntary petition. In *re Nounnan & Co.*, 6 B. R. 579; s. c. 4 L. T. B. 228; s. c. 1 Utah Ter. 44.

If the special verdict found by the jury is defective, there is a mistrial, and the case remains pending in court after the verdict is stricken out. In *re Robert G. King*, 3 Dillon, 364.

**New Trial.**—A proceeding in bankruptcy is not a quasi criminal proceeding. It does not involve any charge of crime, and is, like every other question of fact, to be decided by the weight of evidence and tried like any civil case. Incidental to the trial of jury causes, all courts of record, unless specially restricted from its exercise, possess the power of revising verdicts of juries and setting them aside in all civil cases in their discretion. In *re R. A. De Forrest*, 9 B. R. 278; in *re Dunn et al.*, 9 B. R. 487; s. c. 12 Blatch. 42.

The matter decided by the verdict of a jury upon a mere denial of the truth of the petition, is as to the act of bankruptcy alleged, and that is all the verdict determines either by its terms or legal effect, and it can be pleaded in bar only to a new proceeding in bankruptcy for the same act. The fact of partnership in a proceeding against alleged partners, while it is essential to the maintaining of the joint petition, yet, like the fact of the petitioning creditor's debt, is really but incidental to the main issue, and the verdict adverse to the petitioning creditor is not a bar to a subsequent action at law, nor does it conclude either fact. In *re Jelsh & Dunnebacke*, 9 B. R. 412.

A new trial will not be granted on account of an error in the charge, when it could have been corrected at the time without changing the result. *Hamlin v. Pettibone*, 10 B. R. 172; s. c. 6 Biss. 167.

If new evidence is discovered after the trial, the bankrupt may make an application to the district court setting forth sufficient facts to justify the court in reopening the question connected with the decree and asking for a rehearing. The district court has the power in a proper case to entertain and grant such an application. In *re Great West. Tel. Co.*, 5 Biss. 359.

If the court has no jurisdiction over the case, an attaching creditor may move to set the proceedings aside. In *re Fogerty & Gerrity*, 4 B. R. 451; s. c. 1 Saw. 233; s. c. 2 L. T. B. 174; in *re John B. Bergeron*, 12 B. R. 385; s. c. 10 Pac. L. R. 259; s. c. 2 Cent. L. J. 507.

Notice of a motion to annul an adjudication must be served upon the bankrupt, for he has an interest in the continuance of the proceedings which may result in his discharge. In *re Bush*, 6 B. R. 179; s. c. 6 W. J. 276.

The mere subscription of a decree is not per se an adjudication. The draft of an order, though signed, remaining in the sole possession and knowledge of the judge, whether for the purpose of further consideration or for any other reason, is subject to his control, and not final so as to conclude him; and until it is in some manner notified to the clerk of the court or to one of the parties in such wise that this decision can be properly said to be promulgated or announced, it concludes no one. This is not to be taken to import that all orders must be announced formally in

open court, or that orders which may be made out of court must be formally proclaimed, but there must be something tantamount to promulgation or delivery, something of which the parties to be affected can have or can obtain knowledge, before their rights can be said to have received adjudication, something which completes and authenticates the judicial act. In re Boston R. R. Co., 6 B. R. 222; s. c. 9 Blatch. 409.

A memorandum signed by the initials of the judge directing that an order of adjudication be entered is not an adjudication, nor can such an order be entered nunc pro tunc. The test is whether a formal order of adjudication has been entered. Until the entry of such formal order a discontinuance is always allowed to be entered if desired by the petitioning creditor. A direction that such order be entered is no more than the decision of the judge. It is not a judgment, or an entry on the files of the court that the court adjudges thus and so. The form of an adjudication is prescribed by Form No. 58. Nothing else is an adjudication. In re Joseph M. Hill, 10 B. R. 133; s. c. 7 Ben. 378; s. c. 1 A. L. T. (N. S.) 421.

A motion to strike out a default and an adjudication thereon is too late when it is made after a delay of several days, during which time the debtor has delivered the list of his creditors to the marshal, and could in no case be entertained without the most ample and satisfactory excuse for the delay. In re J. Neilson, 7 B. R. 505.

The defense that the debt of the petitioning creditor is based upon the sale of intoxicating liquors is not one to be favored by the courts, and hence the facts must be stated fully and particularly, in order that the court may see that the case comes within the law. Ibid.

The granting of a rehearing opens a decree and suspends its operation. In re Boston R. R. Co., 6 B. R. 222; s. c. 9 Blatch. 409.

No mere outside creditor has a right to ask that an adjudication shall be annulled. In re Bush, 6 B. R. 179; s. c. 6 W. J. 276; Karr v. Whittaker, 5 B. R. 123.

An agreement to dismiss the proceedings in bankruptcy is to some extent under the jurisdiction and control of the bankruptcy court, and may be set aside even after the proceedings have been dismissed, upon satisfactory proof that it was obtained by fraud or given inadvertently or improperly, under a mistake of fact. In re Francis J. Buler, 7 B. R. 552.

A release given to the assignee after the proceedings in bankruptcy have been dismissed can not be set aside by the bankruptcy court. The case has passed out of the jurisdiction of the bankruptcy court, and will not be reinstated for the purpose of deciding a new controversy which has arisen since the dismissal Ibid.

An order adjudicating a debtor a bankrupt, made after the return day, but upon the petition of a creditor, and after notice to and appearance by the debtor, though it may be irregular, is not void, and can not be collaterally assailed. Hobson v. Markson, 1 Dillon, 421.

An adjudication in involuntary bankruptcy made against an infant can not be ratified by him after he becomes of age, so as to give the court jurisdiction as of the time of the adjudication. In re Walter S. Derby, 8 B. R. 106; s. c. 6 Ben. 232.

An adjudication against an infant, who does not appear by a guardian ad litem, can not be upheld. It is an adjudication against a person who has no legal existence so as to be proceeded against in a court as if he were of full age. *Ibid.*

If the debtor was non compos mentis at the time of the adjudication, the adjudication will be set aside. *In re Alonzo Murphy*, 10 B. R. 48.

Where an attorney assumes to appear and give any waiver of time, or anything else, and to admit the charge brought against the debtor, the debtor may appear within a reasonable time and move the court to have the proceedings set aside. But he must move promptly, to show that he is standing upon his rights, and if he does not, the court will refuse the motion. *Lester v. Payson*, 8 B. R. 317; s. c. 9 B. R. 205; s. c. 6 C. L. N. 157.

The mere pendency of a prior petition against the bankrupt in another district which is there contested, is no ground for setting aside an adjudication. *In re William Harris et al.*, 6 Ben. 375.

If the debtor appeared and was adjudicated a bankrupt on his admission of the commission of the alleged act of bankruptcy, the adjudication will not subsequently be set aside at the instance of other creditors, although the debtor did not commit such act of bankruptcy. *In re James S. Thomas*, 11 B. R. 330; s. c. 7 C. L. N. 187.

**Costs.**—When there is a trial by jury, the docket fee of \$20 to the attorney of the successful party is taxable as part of the costs. There is a distinction between trial and judgment without a trial. The pleadings may be filed, the issues made up, but until the jury is sworn there is no trial. *Gordon, McMillan & Co. v. Scott & Allen*, 2 B. R. 86; s. c. 1 L. T. B. 99; s. c. 7 A. L. Reg. 749.

When there is no denial and no contest, no docket fee can be allowed to the attorney for the petitioning creditor. *In re Mead & Co.*, 8 Phila. 174.

When the petition is dismissed by order of the court, the debtor is entitled to recover from the petitioner the same costs that are allowed by law to a party recovering in equity. The attorney's fee is \$20. No fee can be taxed for the attorney for the petitioning creditor. *Dundore v. Coates*, 6 B. R. 304.

When it appears that the debtor was guilty at the time the petition was filed, but has since reduced the petitioning creditor's debt below \$250, by payments, a judgment may be entered that he shall pay all taxable costs except docket fees made up to the time of filing his denial, and that on such payment the proceedings shall be dismissed. *In re Skelly*, 5 B. R. 214; s. c. 3 Biss. 260.

When the petition is dismissed, the petitioning creditor's debt can not be set off against the costs taxed in favor of the respondent. *In re Lowenstein*, 3 B. R. 239; s. c. 3 Ben. 422.

If the proceedings are dismissed upon payment of the petitioning creditor's claim, he is only entitled to such costs as are allowed to party recovering in a suit in equity. No allowance can be made for disbursements or counsel fees. *In re Daniel Sheehan*, 8 B. R. 353.

If the motion to dismiss is founded upon new and plausible considerations, the court in denying it may refuse to award costs against either party. *In re Daniel Sheehan*, 8 B. R. 345.



**Discontinuance.**—None of the creditors who have joined in the petition will be allowed to withdraw unless all do so. In re Heffren, 10 B. R. 213; s. c. 6 Biss. 156; in re Edward Sargent, 13 B. R. 144; in re Philadelphia Axle Works, 1 W. N. 126.

If they were induced to join in the petition by false representations, they may be allowed to withdraw on discovering the truth. In re Heffren, 10 B. R. 213; s. c. 6 Biss. 156; in re Edward Sargent, 13 B. R. 144.

The proceedings in involuntary bankruptcy may be withdrawn. *Hastings v. Belknap*, 1 Denio, 190.

The petitioning creditor may dismiss the petition without giving notice to the other creditors. There is nothing in the bankruptcy act to require such notice until the debtor is adjudged to be a bankrupt; the only parties to the proceedings are the petitioning creditor and the debtor. The petitioning creditor has entire control of the proceedings, and can have them dismissed at his pleasure. The only right which any other creditor has, is to file a new petition, or to ask to be substituted in place of the petitioning creditor, under the last clause of section 5026. The order dismissing the suit may be made by the court, upon the motion of the attorney for the petitioning creditor. In re Camden Rolling Mill Co., 3 B. R. 590; s. c. 2 L. T. B. 112.

A right to have a cause discontinued does not per se operate as a discontinuance or divest the court of jurisdiction. Such jurisdiction continues until there is an actual discontinuance. Even if a court refusing a discontinuance commits an error in such refusal, that does not operate as a discontinuance. In re Lacy, Downs & Co., 10 B. R. 477; s. c. 12 Blatch. 322.

If the order of discontinuance is not to take effect until the fees of the clerk and marshal are paid, the proceedings are actually pending until the conditions of the order are complied with, whatever may be the hindrances that arise to delay such compliance. *Ibid.*

The proceedings can be discontinued only by an order of the court on special application, especially where they have been allowed to lie for a considerable length of time, and an intervening petition has been filed. In re William Buchanan, 10 B. R. 97.

If the proceedings are formally adjourned on the return day, the proceedings can not be discontinued until the adjourned day. In re Lacey, Downs & Co., 10 B. R. 477; s. c. 12 Blatch. 322.

The dismissal of the proceedings will not prevent other creditors from instituting new proceedings. In re Mendenhall, 9 B. R. 380; s. c. 6 C. L. N. 192.

The creditor can not dismiss the petition after the debtor has been adjudged a bankrupt. Other creditors then have an interest in the proceedings. If the parties desire to make a settlement, they can proceed under Section 5103. In re Sherburne, 1 B. R. 558; in re Lacey, Downs & Co., 10 B. R. 477; s. c. 12 Blatch. 322.

If the proceedings are dismissed, an order reinstating the proceedings without notice to, or appearance by, the debtor, is without authority, and any adjudication following such reinstatement is void. *Gage v. Gates*, 15 B. R. 145; s. c. 62 Mo. 412.

The expression "such debtor" has relation properly only to the debtor against whom a petition is filed by creditors. In *re Thomas McKeon*, 11 B. R. 182; s. c. 7 Ben. 513.

The provisions of this section apply solely to cases where there has been an adjudication, and confer the power of discontinuance in such cases. *Ibid.*

The provisions of this section do not apply to cases of discontinuance where there has been no adjudication, or restrict or take away the power of discontinuance which existed in such cases independently of this section. *Ibid.*

Where the bankrupt and all the creditors who have proved their debts are willing, the petition may be dismissed and the proceedings discontinued. In *re W. D. Miller*, 1 B. R. 410; in *re Stern*, 6 I. R. R. 87; in *re Robert Morris, Crabbe*, 70; in *re George R. Magee*, 1 W. N. 21.

If all the creditors do not consent, there can be no discontinuance without a notice to all the creditors, and a hearing of them, and an approval by the court of the propriety of a discontinuance. In *re Thomas McKeon*, 11 B. R. 182; s. c. 7 Ben. 513.

If all the creditors will not assent to the dismissal of the proceedings, the bankrupt may settle with those who will consent, and give security to the nonassenting creditors for any claim which they may have against the bankrupt, or be able to sustain before a competent tribunal, and the proceedings will then be dismissed. In *re Great West. Tel. Co.*, 5 Biss. 359; in *re Indianapolis R. R. Co.*, 8 B. R. 302; s. c. 5 Biss. 287.

If there is a creditor who *prima facie* has a claim against the bankrupt which is liable to be proved, before the court can dismiss the proceedings, his claim should receive some security or protection. In *re Indianapolis R. R. Co.*, 8 B. R. 302; s. c. 5 Biss. 287.

Cases may occur in which justice to the bankrupt and to his creditors, and the whole scope and spirit of the system require that an adjudication ought to be revoked and superseded. The district court has the power to revoke it, although the statute has no enumeration of such cases or special provision or grant of power. The court to whom the power is given to make an adjudication has the power to recall it, if it is used as an instrument of fraud, oppression or injustice. In *re Robert Morris, Crabbe*, 70.

It is not necessary that a personal notice of an application for a supersedeas shall be personally served on the creditors who have proved their debts. A publication is sufficient. *Ibid.*

The adjudication may be superseded by an order without issuing a writ or supersedeas. *Ibid.*

The adjudication may be revoked even after a discharge has been granted. *Ibid.*

The effect of a supersedeas, if lawfully ordered, is to annihilate the adjudication, and place the bankrupt with his estate and effects in the same situation he would have been in had it never existed. *Ibid.*

If the bankrupt is dead, a supersedeas can have no effect on him or his personal rights; it can only operate on his estate for the benefit of his representatives. Their right does not descend from him, but is cast upon

them by law by an event, which, occurring after his death, vests no rights or interests in him. The right arises by and from the supersedeas, and has no existence before or without it. *Ibid.*

The possibility of regaining the property by a supersedeas does not give the bankrupt any right or interest in it which he can transmit to another either by an assignment or a devise. *Ibid.*

**Intervention by Other Creditors.**—The application of a creditor to have the debtor declared a bankrupt inures to the benefit of all the creditors, any of whom may come in and prosecute the application if he thinks proper. *In re Freedley & Wood, Crabbe, 544*; *in re R. & L. Calendar, 1 N. Y. Leg. Obs. 200*; s. c. 5 *Law Rep. 125*.

Other creditors may intervene at any time when necessary for the purpose of preserving and protecting their interests in the estate of the debtor. They may, therefore, intervene before the return day, and resist a motion made by the debtor for a dismissal of the proceedings upon the consent of the petitioning creditor. *In re Mendenhall, 9 B. R. 380*; s. c. 6 *C. L. N. 192*.

The statute contemplates two possible exigencies; one that the petitioning creditor abandoning the proceedings may not appear; the other that the petitioning creditor may not proceed with the petition. In either event any other creditor may intervene, and, on his application, the court may proceed to an adjudication. *In re Lacey, Downs & Co., 10 B. R. 477*; s. c. 12 *Blatch. 322*; *in re William Buchanan, 10 B. R. 97*.

If any other creditor wishes to have himself substituted in place of the petitioning creditor, he ought to appear on the return day, or adjourned day, and present his petition, if the petitioning creditor does not appear and proceed. If no other creditors appear upon that day, the petitioning creditor may have his petition dismissed, without giving notice of such dismissal to other creditors, and the order of discontinuance will not, in such case, be set aside. The order of dismissal may be made by the court on application of the petitioning creditor. *In re Camden Rolling Mill Co., 3 B. R. 500*; s. c. 2 *L. T. B. 112*; *in re Freedley & Wood, Crabbe, 544*.

The adjourned day on which another creditor may appear and prosecute is any day to which the proceedings on the order to show cause may be adjourned for the purpose of inquiring into the allegations of the acts of bankruptcy. *In re Lacey, Downs & Co., 10 B. R. 477*; s. c. 12 *Blatch. 322*.

The purpose of the statute is that if the petitioning creditor does not appear and prosecute his petition to an adjudication, another creditor may do so while the proceedings are pending; that is to say, on the return day of the order to show cause, or on any day to which the proceedings may be adjourned for showing cause. *Ibid.*

Whether the party filing a supplemental petition is a creditor is a question for the court and not for the jury, and must be established before the debtor can be required to try the questions presented by a denial of the acts of bankruptcy. *Knickerbocker Ins. Co. v. Comstock, 9 B. R. 484*; s. c. 6 *C. L. N. 142*; *in re Richard J. Mendenhall, 9 B. R. 497*.

The intervening petition may be filed even after the filing of the petition for leave to discontinue the proceedings. *In re William Buchanan, 10 B. R. 97*.

Where other creditors have filed supplemental petitions, they have a right on the return day to insist on a trial, though the original petitioners consent to a continuance of the case. *Knickerbocker Ins. Co. v. Comstock*, 9 B. R. 484; s. c. 6 C. L. N. 142.

When the creditor intervenes, he should be allowed to prosecute the original petition in the same manner as the petitioning creditor could have done. *In re Lacey, Downs & Co.*, 10 B. R. 477; s. c. 12 Blatch. 322.

It is not in the power of the petitioning creditor or of the bankrupt, by any arrangement between them, to cut off or defeat this right of intervention, and any action of the court which prevents or defeats such right is in violation of the statute. *Ibid.*

If other creditors intervene and resist the motion, the petitioning creditor will not be allowed to dismiss the proceedings, although his debt and all of the costs have been paid. *In re Mendenhall*, 9 B. R. 380; s. c. 6 C. L. N. 192; *in re R. & L. Calendar*, 1 N. Y. Leg. Obs. 200; s. c. 5 Law Rep. 125.

The application should be made on the return or adjourned day, because the debtor is then in court, advised of the proceedings against him. If a creditor allows that time to pass, he can no longer rely upon the existing petition as his basis of action, but must begin anew and bring the debtor into court upon his own motion and proceedings. *In re Olmstead*, 4 B. R. 240; *in re Freedley & Wood, Crabbe*, 544.

**Malicious Prosecution.**—In order to recover in an action for maliciously instituting proceedings in bankruptcy, the debtor must show not merely a wrongful prosecution of the proceedings, but a want of probable cause. *Sonneborn v. Stewart*, 2 Woods, 599.

In order to justify a party in instituting proceedings in bankruptcy, he must have a legal debt or demand. If he is an actual creditor, he can defend himself from the charge of maliciously instituting the proceedings, by showing that he had probable cause to believe that the debtor had committed an act of bankruptcy. But if he had no legal debt or demand, then he had no right to institute the proceedings, whether he had such probable cause or not. He can not allege that, though he had not a legal debt or demand, yet he had probable cause to believe he had such a demand. He took on himself the risk of having such a demand. *Ibid.*

If it is shown by judicial determination that a party had no legal debt or claim, he can not, in an action for maliciously instituting proceedings in bankruptcy, show that he had probable cause to believe that an act of bankruptcy had been committed, but is liable for the damages sustained thereby. *Ibid.*

If a party had reason to believe that he had a legal debt or claim, and had probable cause to believe that the alleged debtor had committed an act of bankruptcy, he can not be charged with actual malice. *Ibid.*

A decision to the effect that a certain act is an act of bankruptcy, is sufficient to protect a person from a charge of actual malice in reposing on its authority, although it has since been modified. *Ibid.*

In order to recover exemplary damages, the debtor must show that the creditor was guilty of actual malice, in other words that he willfully instituted and carried on the proceedings when he knew that there was no ground therefor. *Ibid.*

§ 5027. [This section is repealed by act of June 22, 1874, ch. 390, § 14, 18 Stat. 182.]

ACTS OF 1867 and 1874, § 5028. If upon the hearing or trial the facts set forth in the petition are found to be true, or if upon default made by the debtor to appear pursuant to the order, due proof of service thereof is made, the court shall adjudge the debtor to be a bankrupt, and shall forthwith issue a warrant to take possession of his estate.

Statute revised — March 2, 1867, ch. 176, § 42, 14 Stat. 537. Prior Statute — April 4, 1800, ch. 19, § 5, 2 Stat. 23.

There is never any propriety in delaying the issuing of the warrant after an adjudication in an involuntary case. On the contrary, it ought to be and can be issued forthwith, as the statute requires, so that the property of the bankrupt may be forthwith taken possession of by the marshal, as the messenger of the court. *In re Howes & Macy*, 9 B. R. 423; s. c. 7 Ben. 102.

A day for the first meeting of creditors can be named in the warrant, although the schedule of creditors has not been prepared. The day must be not less than ten nor more than ninety days after the issuing of the warrant. *In re Howes & Macy*, 9 B. R. 423; s. c. 7 Ben. 102. See ante, p. 204.

ACTS OF 1867 and 1874, § 5029. The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to those hereinafter<sup>1</sup> provided for the taking possession, assignment, and distribution of the property of the debtor, upon his own petition.

Statute revised — March 2, 1867, ch. 176, § 42, 14 Stat. 537. Prior Statute — April 4, 1800, ch. 19, § 6, 2 Stat. 23.

There is no such thing as a surrender in involuntary bankruptcy. There is a seizure of property. An adjudication in involuntary bankruptcy, even though uncontested, does not make the debtor a voluntary bankrupt or give him the privilege of making, or the register the power of accepting, the surrender which only a voluntary bankrupt can make. Nor can it make any difference, that after an uncontested adjudication in an involuntary case, the bankrupt desires to make a surrender. The machinery of an involuntary case having been set in motion, the case must proceed as an involuntary case. The court has no discretion to vary the mode of procedure, or to substitute the register for the marshal, as the officer to act. *In re Howes & Macy*, 9 B. R. 433; s. c. 7 Ben. 102.

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<sup>1</sup> So amended by act of February 18, 1875, ch. 80, 18 Stat. 320.

An order may be passed allowing the debtor to sell his property at retail, and pay the proceeds to the messenger daily. *In re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.

If the marshal under the warrant takes property out of the possession of a receiver appointed by a State court, he must return it. *In re Glenham Manuf. Co.*, 1 Cent. L. J. 100.

ACT OF 1898, CH. 3, § 7. **Duties of Bankrupts.**—(a) The bankrupt shall \* \* \* (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

ACT OF 1867, § 5030. The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days, not exceeding five, after the date of the order or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, post-paid, to the messenger, a schedule of the creditors and an inventory<sup>1</sup> and valuation of his estate in the form, and verified in the manner required of a petitioning debtor.

Statutes revised—March 2, 1867, ch. 176, § 42, 14 Stat., 537; July 27, 1868, ch. 258, § 2, 15 Stat., 228.

ACT OF 1867, § 5031. If the debtor has failed to appear in person, or by attorney, a certified copy of the adjudication shall be forthwith

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<sup>1</sup> So amended by act of June 22, 1874, ch. 390, § 15, 18 Stat. 182.

served on him by delivery or publication in the manner provided for the service of the order to show cause: and if the bankrupt is absent or can not be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain.

Statute revised — March 2, 1867, ch. 176, § 42, 14 Stat. 537.

The service of the order of adjudication is a necessary incident to the duty of serving the warrant, although it is not embraced within the command of the writ. The service by publication is mainly a right or privilege personal to the bankrupt, and the delay in such service should not retard the general course of proceedings. The return of the service of the order may be made wholly on the warrant or separately on the warrant and order, but the latter course is preferable. In *re Kennedy et al.*, 7 B. R. 337.

## **TITLE IX.**

### **PROCEEDINGS TO REALIZE THE ESTATE FOR CREDITORS.**

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ACT OF 1898, CH. 1, \* \* \* § 1. **Definition.**—(9) “Creditor” shall include any one who owns a demand or claim provable in bankruptcy and may include his duly-authorized agent, attorney or proxy.

ACT OF 1898, CH. 6, \* \* \* § 55. **Meetings of Creditors.**—(a) The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

ACT OF 1898, CH. 6, § 58. **Notices to Creditors.**—(a) Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy, and (8) the proposed dismissal of the proceedings.

(b) Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct: the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.



(c) All notices shall be given by the referee, unless otherwise ordered by the judge.

ACT OF 1898, CH. 6, § 28. **Designation of Newspapers.**— (a) Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

Under the law of 1867 it was held that a mere clerical mistake occurring in proceedings in bankruptcy, though resulting in a failure to specially notify creditor, will not destroy the effect of the proceedings as regards such creditor. *Thornton v. Hogan*, 17 B. R. 277.

ACT OF 1867, § 5032. The notice to creditors under warrant shall state: First. That a warrant in bankruptcy has been issued against the estate of the debtor.

Second. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

Third. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

Statute revised — March 2, 1867, ch. 176, § 11, 14 Stat. 521. Prior Statute — April 4, 1800, ch. 19, § 6, 2 Stat. 23.

The fixing of the time for the first meeting of creditors is a matter in the discretion of the register. *In re Heyes*, 1 B. R. 21; s. c. 1 Ben. 333; s. c. 36 How. Pr. 249.

Where, after the issuing of the warrant, an amendment is made adding the names of a large number of creditors, a new warrant should be issued, to be served on all the creditors of the bankrupt. This warrant should briefly recite the proceedings that gave rise to the new warrant, and embrace the names contained in the original warrant, as well as those added by the amendment. If the newspaper notices have been properly given under the original warrant, they need not be repeated. *In re Perry*,

1 B. R. 220; s. c. 1 L. T. B. 4; in re Ratcliffe, 1 B. R. 400; in re Morgenthal, 1 B. R. 402; in re Hall, 2 B. R. 192; s. c. 16 Pitts. L. J. 52.

**ACT OF 1898, CH. 6, § 55. Judge or Referee Shall Preside.—**

(b) At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

ACTS OF 1867 and 1874, § 5033. At the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required.

**Statute revised — March 2, 1867, ch. 176, § 12, 14 Stat. 522.**

The marshal's return is only prima facie evidence of the matters set forth therein. The notice required by the warrant must be given, and until due notice has been given, an assignee can not be chosen or appointed. If by the return it appears that due notice has been given, the proceedings go on. If by the return it appears that due notice has not been given, the meeting is adjourned. But the return is not conclusive. For, if, although the return states the due giving of the notice, it satisfactorily appears that due notice has not been given, the meeting must be adjourned. If, however, the return shows that due notice has been given, and there is no satisfactory evidence aliunde that due notice has not been given, the return is prima facie evidence of the due giving of notice, and is conclusive until rebutted; and is sufficient authority for the register to proceed and cause an assignee to be chosen or appointed. In re W. D. Hill, 1 B. R. 16; s. c. 1 Ben. 321; in re J. Pulver, 1 B. R. 46; s. c. 1 Ben. 381; in re Hall, 2 B. R. 192; s. c. 16 Pitts. L. J. 52.

When the papers in the case show that notices of the issuing of the warrant and of the first meeting of creditors were duly published, and that a like notice, containing the name of a particular creditor as creditor, and a statement of his residence, and of the amount of his debt, and the other matters required, was duly served by mail upon him, the fact that he did not receive it, will not affect the regularity of the proceedings. In re Stetson, 3 B. R. 726; s. c. 4 Ben. 127.

The word "given," wherever used in this section, means published as well as served. To make the proceedings regular, the publication must be completed, and the notices served before the commencement of the period of ten days immediately preceding the return day of the warrant. In re Devlin & Hagan, 1 B. R. 35; s. c. 1 Ben. 335; s. c. 1 L. T. B. 32; in re J. Pulver, 1 B. R. 46; s. c. 1 Ben. 381.

A return by the marshal, in a case of involuntary bankruptcy, that he has sent written or printed notices to the creditors named on the schedules and herewith returned, which schedules were made up by him on the best information he could obtain in respect thereto, is sufficient, although it does not state the sources of the information, or that the bankrupt has furnished schedules or refused to furnish them, or that proceedings have been taken ineffectually to compel him to furnish them. In re James M. Adams, 5 Ben. 544.

A return that the marshal has sent the notices to the creditors on the schedule handed to him by the attorney for the petitioning creditor, is insufficient. In re Josiah Ferris, Jr., 6 Ben. 473.

A notice addressed to "Levley, New York," can not be presumed to have reached Lawrence J. Levy, although he resides and does business in New York. The two names are not *idem sonans*, and can not, by any stretch of construction, be held to be the same in any respect whatsoever. In re Wm. Archenbraun, 11 B. R. 149; s. c. 7 C. L. N. 99.

The new notice need only be given to remedy the defects or irregularities in the first notice. If the defect occurs in the publication, the service on the creditors being regular, a new notice must be published, but no new notices need be served on the creditors. If the defect occurs in the service of the notice on the creditors, the publication being regular, a new notice must be served on the creditors, but no new notice need be published. In re Devlin & Hagan, 1 B. R. 35; s. c. 1 Ben. 335; s. c. 1 L. T. B. 32; in re J. Pulver, 1 B. R. 46; s. c. 1 Ben. 381; in re Hall, 2 B. R. 192; s. c. 16 Pitts. L. J. 52.

When, in proceedings in involuntary bankruptcy, proper publication has been made, but no notices have been served upon creditors, because the bankrupt did not have sufficient time to prepare his schedules, the proper course is to adjourn the meeting to a day certain, and to direct the giving for the adjourned day of a new notice in respect of the serving by mail or personally, but not in respect of the publication. When there is no adjournment in a case where the service of the warrant is defective, the proceedings fall through, and there must be a new warrant. In re Schepele et al., 3 B. R. 170; s. c. 3 Ben. 346.

A notice not addressed to the creditor by his name does not amount to a notice. The only way in which to cure such an error is by issuing and serving a new and correct notice, unless the creditor will voluntarily appear and waive notice, which waiver will, of course, bind him. Anon., 1 B. R. 123.

All proceedings founded upon a defective notice are irregular, and must be set aside. In re Hall, 2 B. R. 192; s. c. 16 Pitts. L. J. 52.

ACT OF 1898, CH. 1, § 1. (a) The word (26) trustee shall include all the trustees of an estate.

ACT OF 1898, CH. 5, § 44. **Appointment of Trustees.**—(a) The creditors of a bankrupt estate shall, at their first meeting after the

adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

§ 45. **Qualifications of Trustees.**—(a) Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

Assignee is but a trustee for the creditors. While he holds the property, a creditor may bring an action to set aside the transfer by the bankrupt, as fraudulent, if he makes the assignee a party; if not, the defendant may set this up as a defect of parties. *Dewey v. Moyer*, 16 B. R. 1.

Until an assignee is appointed, the bankrupt is the trustee of his estate for the benefit of his creditors. *Ex parte Tremont Nat. Bk., in re Battey*, 16 B. R. 397.

If he is an indorser upon notes or bills which mature before the appointment of an assignee, he may waive demand and notice. *Ibid.*

Semble, That he may, even without leave of court, begin any suits necessary to save statute of limitation, or such as are otherwise of immediate urgency, although he can not without suit receive payment. *Ibid.*

Act of 1867, § 5034. The creditors shall, at the first meeting held after due notice from the messenger, in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts. If no choice is made by the creditors at the meeting, the judge, or if there be no opposing interest, the register, shall appoint one or more assignees. If an assignee, so chosen or appointed, fails, within five days, to express in writing his acceptance of the trust, the judge or register may fill the vacancy. All elections or appointments of assignees shall be subject to the approval of the judge; and when, in his judgment, it is for any cause needful or expedient, he may appoint additional assignees, or order a new election.

Statute revised—March 2, 1867, ch. 176, § 13, 14 Stat. 522.

Choice of Assignee by Creditors. The meeting should be organized at the hour designated in the notice, or as soon thereafter as practicable, and

should be kept open until a choice of assignee is made, or it is ascertained that no choice can be made. Where the creditors are so numerous that it is impossible to take the proofs of all the debts on the day designated in the warrant, the meeting may be adjourned from day to day, so as to furnish a proper opportunity to all creditors to prove their debts, and thus qualify themselves to join in selecting an assignee. The several adjournments will constitute but one meeting, and will affect the proceedings in no other way than would a necessary postponement of business from one to another hour in the same day. See Rule VI. In *re Phelps, Caldwell & Co.*, 1 B. R. 525; s. c. 2 L. T. B. 25; in *re C. H. Norton*, 6 B. R. 297.

No particular mode nor manner of voting is prescribed by the act. It may be assumed, therefore, that any mode or manner of voting, by which the choice of each creditor entitled to vote is clearly expressed, is sufficient. It may, no doubt, be taken by ballot or viva voce. It may be taken by calling the name of each creditor, or by calling upon the person or persons representing creditors by power of attorney, to name the choice of the creditor or creditors represented by him. The latter mode can not be recommended as the most approved mode, but can hardly be said to be incompetent or irregular, so long as it clearly appears expressed. In *re Lake Superior S. C. R. R. & I. Co.*, 7 B. R. 376.

The register should not in any manner interfere with or influence, either directly or indirectly, the choosing of an assignee by the creditors. His action should in all things be that of strict impartiality, not only in fact, but in appearance, and he should not present the semblance of having any interest or bias in favor of or against any particular person or assignee. In *re J. O. Smith*, 1 B. R. 243; s. c. 2 Ben. 113.

No creditor has any right to be heard, either in person or by attorney, upon any part of the proceedings until he has proved his claim. In *re W. D. Hill*, 1 B. R. 16; s. c. 1 Ben. 321; in *re Altenheim*, 1 B. R. 85; s. c. 1 Ben. 431; in *re Brisco*, 3 B. R. 226; in *re Decatur Jones*, 2 B. R. 59; in *re Phelps, Caldwell & Co.*, 1 B. R. 525; s. c. 2 L. T. B. 25.

Votes can not be objected to on the ground that they have been influenced and procured by the bankrupt in his own interest. In *re Noble*, 3 B. R. 96; s. c. 3 Ben. 332.

The register has no power, without a special order of court, to inquire into the rights of creditors to vote, save for the purpose of postponing the proof of claims until an assignee is chosen pursuant to the provisions of section 5082. In *re Noble*, 3 B. R. 96; s. c. 3 Ben. 332; in *re Herman et al.*, 3 B. R. 618; s. c. 4 Ben. 126.

When objections are made to the claim of a creditor, the register should listen to them, and if a prima facie case is made out, should postpone the proof of the claim till the assignee is chosen. In *re Herman et al.*, 3 B. R. 618; s. c. 4 Ben. 126; in *re Lake Superior S. C. R. R. & I. Co.*, 7 B. R. 376.

A claim may be postponed where the doubts are whether the claim is valid, in view of the receipt of a preference contrary to the provisions of the act by the creditor. The register ought to exclude from voting for an assignee all persons who appear to him, on proof, to be inhibited from proving their debts on this account. He may do so by postponing the

proof of such claims until after the election or appointment of an assignee, although the depositions for the proof of such claim have been produced to and filed with him. Taking property on attachment or execution is receiving a preference. Merely obtaining a judgment is not. In *re Ezra M. Stevens*, 4 B. R. 367; s. c. 4 Ben. 513; s. c. 2 L. T. B. 121.

If the objection to the right of a creditor who has made the proper formal proof of his debt to vote, rests on the sole ground that he has security for the debt upon the bankrupt's property, the better, if not the only proper mode of presenting the question, is to move to expunge the proof. In *re Jaycox & Green*, 7 B. R. 303.

A vote may be taken for assignee while a contest is pending over the postponement of the proof of claims. The bankruptcy act nowhere directs, nor does it seem to contemplate, a postponement of the vote for assignee, where some creditors have proven their debts, in order to enable others to do so. On the contrary, it seems to contemplate the utmost practical expedition in choosing the assignee, and for a very good reason, because until there is an assignee, there is no one to represent, or whose official duty is to look after, the interests of the estate. The creditors who have proved their claim and are entitled to vote for assignee, may, no doubt, consent, if they see fit to wait for others to prove, before proceeding to choose the assignee. It is, however, optional with them. But even this power should be exercised sparingly, and the vote ought always to be taken at the earliest practical moment. In *re Lake Superior S. C. R. R. & I. Co.*, 7 B. R. 376; in *re Northern Iron Co.*, 14 B. R. 356.

In any case where a creditor, whose proof of claims has been postponed by the register, is dissatisfied with the result of the vote for assignee, and considers the postponement of his claim erroneous, such creditor may have the proceedings certified to the court, and if the postponement appears to have been erroneous, the court may set aside the result of the vote, and refer the matter back for a new vote, unless it appears to a reasonable certainty that the result would not be changed by another vote. The postponement of the proof of the claim affects no right of a creditor, except a right to vote for assignee, and where it appears that the exercise of such right would be barren of results, it would be useless to delay the proceedings in order to afford such creditor the opportunity to exercise such right. In *re Lake Superior S. C. R. R. & I. Co.*, 7 B. R. 376.

If debts are objected to, and the register considers them clearly valid and admissible, yet he can not admit them to proof against objection. In such an event the court must be applied to if the objections are not withdrawn. The register has no power to proceed to a choice of assignee without the votes of all the creditors who wish to vote, if their votes can influence the result, unless the register himself considers the claims doubtful. He can not postpone them merely because they are objected to. In *re Bartusch*, 9 B. R. 578.

A creditor who makes proof of his debt in due form, but retains the deposition in his own possession, is not a creditor who has proved his debt, within the technical meaning of those terms as used in the bankruptcy act.

In re Sheppard, 1 B. R. 439 s. c. 1 L. T. B. 49; s. c. 7 A. L. Reg. 484. Contra, King v. Bowman, 24 La. An. 506.

A creditor holding security can not vote for an assignee. In re Davis & Son, 1 B. R. 120; s. c. 7 A. L. Reg. 30; in re Walton et al., 1 Deady, 442; in re S. Hanna, 7 B. R. 502; s. c. 5 Ben. 5; in re J. F. & C. R. Parkes, 10 B. R. 82. Contra, in re Bolton, 1 B. R. 370; s. c. 2 Ben. 189.

A secured creditor who seeks to prove his debt before the choice of an assignee, must abandon his security; whereas, if he seeks to prove his debt after the choice of an assignee, he is permitted to do so when he has complied with the terms of section 5075. As he has security, the policy of the act is to leave his rights to be settled after there is an assignee to contest his claims to the property and protect the estate. In re High et al., 3 B. R. 192; s. c. 1 L. T. B. 175; s. c. 2 C. L. N. 9.

But the security must be upon the property of the bankrupt; otherwise he may prove the full amount of his claim, and vote. In re Cram, 1 B. R. 504; s. c. 1 L. T. B. 65.

A creditor who holds a mortgage upon the homestead of the bankrupt, has the right to prove his demand and vote. In re J. R. Stillwell, 7 B. R. 226; s. c. 11 A. L. Reg. 706; in re Tertelling, 2 Dillon, 342, note.

Where a creditor has two claims, one of which is unsecured and the other secured, he may prove the former and vote. In re J. F. & C. R. Parkes, 10 B. R. 82.

An officer of a bankrupt corporation, if he is a creditor, has just as much right to vote for an assignee as any other creditor. In re Northern Iron Co., 14 B. R. 356.

Agents and attorneys-at-law can not vote without producing letters of attorney. The party who is entitled to vote for another must be his duly appointed attorney in fact. In re Purvis, 1 B. R. 163; s. c. 1 L. T. B. 19; in re Knoepfel, 1 B. R. 23; s. c. 1 Ben. 330.

A partner may cast the whole vote of his firm, but, in estimating the number of votes, the firm vote will only count as one vote. One of several joint creditors, not partners, can not act or vote without the consent of the others. In re Purvis, 1 B. R. 163; s. c. 1 L. T. B. 19.

Where the bankrupt petitions alone, the creditors of a firm of which he was a member can not vote. Ibid.

There is no such thing known to the law as an informal vote. An expression of opinion viva voce by the creditors as to their preference is a vote. In re Pearson, 2 B. R. 477.

When a creditor sells or assigns his debt after it has been proved, he has no further business in court, although the proceedings must be carried on in his name. The actual owner and assignee must control the debt, vote upon it and receive the dividend. Where several claims have been assigned to one person, he has but one vote. In re Frank, 5 B. R. 194; s. c. 5 Ben. 164; s. c. 2 L. T. B. 188.

Form No. 15 contemplates that each creditor shall vote, and that his name, residence, and amount of debt shall be recorded. If, on the first vote, no choice be made, by reason of a greater part in number and value failing to concur, a second, third, or any number of ballots may be had,

until the required concurrence be obtained. If the creditors can not agree upon the first day of the meeting, they may adjourn to another day. If no such concurrence is obtained, and the meeting adjourns *sine die*, the contingency happens which authorizes the judge, or if there be no opposing interest, the register to appoint an assignee. *In re Phelps, Caldwell & Co.*, 1 B. R. 525; s. c. 2 L. T. B. 25.

The duty of preparing the memorandum for the signatures of the creditors devolves on the register. The recital it contains as to notice must be within his knowledge, derived from the files in the office. In it must be stated the name of the assignee chosen or nominated, and to ascertain this the usual practice is to take a *viva voce* vote of the creditors, and when the required concurrence appears to prepare the memorandum for the signatures of the electing creditors. This memorandum constitutes the evidence of the election of an assignee. Unless it bears the signatures of a majority in number and value of the creditors who have proved their claims, there is no authentic evidence of an election, and the register must certify a failure to make choice by the creditors. *In re Pfromm*, 8 B. R. 357.

A creditor who has given a *viva voce* vote in favor of a party may refuse to sign the memorandum, for he has the right to change his vote at any period during the progress of the election. *Ibid.*

No creditor can change his vote after a final adjournment. *In re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261.

Proofs which are filed after a vote is taken, can not be allowed to come in and change the result. *In re Lake Superior S. C. R. R. & I. Co.*, 7 B. R. 376.

The choice is to be made by the greater part in value and number of those who have proved their debts, and not the greater part, etc., of those present and voting. Such is the plain import of the statute. If the greater part in number and value of those who have proved their debts do not appear and vote for the same person, then there is a failure on the part of the creditors to make a choice. *In re Purvis*, 1 B. R. 163; s. c. 1 L. T. B. 19; *in re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261; *in re Pearson*, 2 B. R. 477.

Where, at the first meeting of the creditors, only one creditor appears and proves his debt, and there are no other debts proven, the right to choose an assignee belongs to the sole creditor who has proved his claim. *In re Haynes*, 2 B. R. 227; s. c. 1 L. T. B. 121.

It is the policy of the bankruptcy act to give the creditors of the bankrupt the choice, in the first instance, of the person who is to take assets and manage them. It is only when the creditors fail to elect, that the register or judge can appoint an assignee. *In re J. O. Smith*, 1 B. R. 243; s. c. 2 Ben. 113; *in re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261.

Where, after the issuing of the warrant, an amendment is made, adding the names of a large number of creditors, and a new warrant has been issued, the creditors, if they deem it expedient, may, on the return day of the second warrant, elect an assignee, and take steps to remove any assignee that may have been elected or appointed in the proceedings under



the first warrant. In *re Perry*, 1 B. R. 220; s. c. 1 L. T. B. 4; in *re Ratcliffe*, 1 B. R. 400; in *re Morgenthal*, 1 B. R. 402.

When the name of only one creditor is added by an amendment, after the meeting has been held, it is not necessary or proper that a new meeting of the creditors to choose an assignee should be held. The creditor should be formally informed of the existence and condition of the suit, and notified to prove his claim if he so desires. In *re Carson*, 5 B. R. 290; s. c. 5 Ben. 277; s. c. 2 L. T. B. 194.

**Appointment of Assignee by the Register or the Court.**—The opposing interest which precludes the register from appointing an assignee is not merely an interest contending by vote, but an interest in opposition to the exercise of the power of appointment by the register. In *re George Jackson et al.*, 14 B. R. 449.

Where there is a failure on the part of the creditors assembled at a meeting to choose an assignee, the register should state to them that the duty of appointing an assignee devolves upon the register, unless there is an opposing interest; and that any creditor has the right to object to the register's making the appointment. In *re Pearson*, 2 B. R. 477.

When the register announces that he has the right to appoint an assignee, unless there is an opposing interest, distinct disclosure should be made if there is any opposing interest. In *re George Jackson et al.*, 14 B. R. 449.

The appointment by the register is irregular where there is an opposing interest. In *re Pearson*, 2 B. R. 477; in *re C. H. Norton*, 6 B. R. 297.

There can be only one first meeting, and all adjournments are but a continuance of the same, and if there is any opposition or opposing interest to an assignee at any stage of such first meeting, such opposition is to be considered as continuing until the termination of such first meeting, whether upon the day first appointed or any other day to which such meeting may be continued, unless it affirmatively appears that such opposition has been withdrawn. In *re C. H. Norton*, 6 B. R. 297.

If the register attends at the time and place specified in the warrant and notice for the first meeting of creditors, and no creditor appears, or is represented, the meeting is held within the provisions of the act as fully and effectually as if creditors had appeared or been represented at the meeting, and the contingency happens which the section speaks of, namely, that no choice of assignee has been made by the creditors at the meeting, and the register is authorized to appoint one. In *re Cogswell*, 1 B. R. 62; s. c. 1 Ben. 388.

An assignee should be appointed, even though no debts have been proved. In *re Cogswell*, 1 B. R. 62; s. c. 1 Ben. 388; in *re Anon.*, 1 B. R. 123.

An assignee should be appointed, even though there are no apparent assets, for he is designed by the statute to act as a trustee on behalf of the creditors, and it is his duty to search out and collect every species of property belonging to the bankrupt. In *re Alexander Graves*, 1 N. Y. Leg. Chs. 213; s. c. 5 Law Rep. 25.

If the resolution to appoint a trustee is not confirmed by the court, and

the first meeting has been adjourned without the election of an assignee, the court may appoint an assignee. In *re Stuyvesant Bank*, 6 B. R. 272.

A general order appointing a person assignee in a class of many cases, is invalid unless it enumerates the particular cases in which the person is intended to be appointed. In *re William Major*, 14 B. R. 71.

A general order appointing an assignee will not be recognized as valid in any case unless the assignee qualifies specially in such case. *Ibid*.

**Approval of the Assignee by the Judge.**—The creditors are alone interested in the distribution of the estate, and it is to be supposed that creditors having pecuniary interests will carefully canvass and inquire into the qualifications of the assignee to whom they recommend the estate to be intrusted. They are supposed to be commercial men, intimately acquainted with the affairs of the bankrupt and the qualifications essential and proper to fit a man to act as their trustee, and unless good and strong reasons are presented to the court, the opinion of the creditors, representing a large majority in amount and number of the parties interested, is entitled to great weight in determining who is the proper person to administer the estate in which they are interested. The discretion vested in the court of approving or disapproving of an assignee, is a legal discretion—one that must be controlled, not by caprice, prejudice, partiality, likes or dislikes, or any other reason than a due regard to the fitness of the proposed assignee for the position. In *re Funkenstein & Co.*, 1 Pac. L. R. 11.

When the register is satisfied that any reasons exist why an assignee elected or appointed should not be approved by the judge, it is his duty to state such reasons freely in submitting the question of approval. In *re Bliss*, 1 B. R. 78; s. c. 1 Ben. 407; in *re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261.

Appointments made by registers, as well as selections made by creditors, are in all cases subject to the approval of the judge. In other words, until the judge has approved the selection, no one should enter upon the duties of assignee. If the judge disapproves, the election or appointment fails. The register has no power to approve, nor is his appointment more than the designation to the judge of a suitable person for the trust. In *re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261.

When there is no imputation upon the competency or character of an assignee duly elected by the creditors, the judge will not withhold his approval. The assignee is entitled to the position by virtue of the law. In *re John C. Grant*, 2 B. R. 106; in *re J. O. Smith*, 1 B. R. 243; s. c. 2 Ben. 113; in *re Joseph Barrett*, 2 B. R. 533; s. c. 1 L. T. B. 144; s. c. 1 C. L. N. 202.

When objection is taken to the approval of an assignee, the burden of proof is upon the objector; but in so delicate a matter, and one in which direct evidence is not always possible, reasonable cause of suspicion may in some cases be sufficient. In *re Clairmont*, 1 B. R. 276; s. c. Lowell, 230; s. c. 1 L. T. B. 6.

If the judge is advised that in any particular case the bankrupt has brought in one or more of his particular friends, and has by them chosen

an assignee, who is also his friend and in his interest, he will withhold his approval. It is certainly against the policy of the bankruptcy act that a bankrupt should select his assignee. It is true that if the creditors do not care sufficiently for the matter to attend the meeting, they ought not to complain. But still the law is no less brought into contempt. The discharge of a debtor who does not surrender all his assets is precisely what those charged with the execution of the law are bound to guard against. *In re Bliss*, 1 B. R. 78; s. c. 1 Ben. 407.

A person will not be allowed to make a regular business of seeking out creditors of bankrupts, and soliciting them to prove their debts and vote for him as assignee, with a view to such pecuniary emolument as may legitimately belong to the position. Such a course opens the door to abuses. *In re Doe*, 2 B. R. 308; s. c. 3 Ben. 66.

It is improper for a party seeking to be assignee to promise to pay the claim of a creditor in full, in order to obtain his vote, and an election so obtained will not be approved. *In re Haas & Sampson*, 8 B. R. 186.

Whether there has been such an influence exercised by the assignee or not as to invalidate his election, must be left to depend upon the circumstances of each case. There might be some solicitation on the part of the assignee, which would in no way influence the choice of the creditors. Neither the bankrupt nor his solicitor can make the proceedings in bankruptcy the proceedings of the bankrupt alone. The bankrupt can not be allowed to elect his assignee. Such an assignee might favor the bankrupt at the expense of the creditor's interest. That the assignee is the confidential clerk of the bankrupt's attorney, may be a good reason for withholding the approval of the choice, if objections are made by the creditors before approval; but such objections should be made, if the facts are known to the creditors, immediately after the election. And if, with full knowledge of the facts, the assignee is allowed to go on and exercise his duties, something more ought to be shown — some misconduct, or that the relation existing is in some way prejudicial to the rights or interests of the creditors. If the creditors, without any undue influence, and with knowledge of the facts, choose such an assignee, and the judge approves, without objection, it is too late to object. *In re Mallory*, 4 B. R. 153; s. c. 2 L. T. B. 130.

Any general bias either for or against the bankrupt, or his dealings, will not disqualify a person of standing and character. In contested cases it would be almost impossible to find any suitable assignee connected in any way with the estate, who had not formed such an impression. The creditors, moreover, retain an important power over the settlement of the estate, and ought to exercise an oversight of the affairs pertaining to it. *In re Clairmont*, 1 B. R. 276; s. c. Lowell, 230; s. c. 1 L. T. B. 6.

Under certain circumstances, a relative of the bankrupt will not be approved. *In re Powell*, 2 B. R. 45; *in re Egert & Ockley*, 3 B. R. 651.

The director of a corporation to which a judgment was confessed by the bankrupt shortly before the filing of his petition will not be approved. He comes within the spirit, if not the letter, of the clause which declares

that a preferred creditor shall not be eligible as assignee. In *re Powell*, 2 B. R. 45.

The assignee must reside in the judicial district in which the proceedings are pending. In *re Havens*, 1 B. R. 485.

Where a person resides out of the district, but has a permanent place of business in the district, he may be appointed assignee in conjunction with another who resides in the district. In *re Loder et al.*, 2 B. R. 515.

If the assignee does not reside in the same place as the bankrupt, a person residing in that place may be associated with him as coassignee. In *re Jacoby*, 1 W. N. 15.

An attorney for a creditor of the bankrupt may be assignee. Section 5035 declares who shall be ineligible as assignee. There is no other provision in the bankruptcy act rendering a person ineligible for this position. In *re Joseph Barrett*, 2 B. R. 533; s. c. 1 L. T. B. 144; s. c. 1 C. L. N. 202; in *re Lawson*, 2 B. R. 396.

The attorney of the bankrupt may be chosen assignee, but he can not occupy the position of counsel and assignee at the same time. He must withdraw from the former position. In *re Clairmont*, 1 B. R. 276; s. c. Lowell, 230; s. c. 1 L. T. B. 6.

When an adjudication of bankruptcy is made against the debtor in three different districts, each district should have an assignee within its jurisdictional limits and a resident thereof. In *re Boston R. R. Co.*, 5 B. R. 233.

A person can not act both as receiver and as assignee, and have his acts authorized by the State court, which appointed him receiver, and by the bankruptcy court. This is a position of incompatibility which the bankruptcy court can not permit one of its officers to occupy. If he is to be assignee, he must look to the bankruptcy court alone as the source of his authority. If he is to hold and administer, as receiver under the State laws, the property which he has received as receiver, he must so administer it, without looking to the bankruptcy court for any authority or direction. If he is to administer such property as an assignee, he must so administer it, without looking to the State court, or to any other court but the bankruptcy court, for authority or direction. He must, moreover, account for the property received by him, and it is not proper that an assignee be plaintiff, and, as receiver, be defendant in respect to these matters. In *re Stuyvesant Bank*, 6 B. R. 272.

Upon the petition of a creditor, an additional assignee may be appointed. In *re Overton*, 5 B. R. 366.

An additional assignee will not in general be appointed at the request of the minority, for the statute does not appear to intend a minority representation. The creditors have the right to decide upon the number of assignees as well as to choose them. In *re Clairmont*, 1 B. R. 276; s. c. Lowell, 230; s. c. 1 L. T. B. 6.

When the judge refuses to approve the choice made by the creditors, he should order a new election. In *re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261.

The court will not send a case back for a new election when it is not apparent that a different result would or might be thereby attained. In re Pfromm, 8 B. R. 357.

The court will not set aside an election of an assignee on account of any irregularity in admitting a claim when its exclusion could not affect the result. In re George Jackson, 14 B. R. 449.

Where a person acts as assignee in a particular case and is so treated by the register and the judge, he may be deemed the assignee *pro hac vice* as to that particular transaction, although he was never legally appointed and never qualified. In re William Major, 14 B. R. 71.

The courts uniformly disapprove of the same person acting as attorney for the bankrupt and the assignee, not because the duties always are conflicting and adverse, but because they may be so. The assignee's attorney is a minister of the court, and his duty is to attend to the estate, even to the prejudice of his own claims, and it is considered inconsistent with his duty if he act also as attorney for the bankrupt. In re Mallory, 4 B. R. 153; s. c. 2 L. T. B. 130.

ACTS OF 1867 and 1874, § 5035. No person who has received any preference contrary to the provisions of this Title shall vote for or be eligible as assignee; but no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility.

Statute revised — March 2, 1867, ch. 176, § 18, 14 Stat. 525.

This clause declares who shall be ineligible as assignee. There is no other provision in the act rendering a person ineligible for this position. In re Joseph Barrett, 2 B. R. 533; s. c. 1 L. T. B. 144; s. c. 1 C. L. N. 202.

The director of a corporation to which a judgment was confessed by the bankrupt shortly before the filing of his petition, comes within the spirit, if not within the letter, of this clause. In re Pow'ell, 2 B. R. 45.

ACT OF 1898, CH. 1, SEC. 1. \* \* \* (26) "Trustee" shall include all of the trustees of an estate.

CH. 5, § 50. **Bond of Trustees.**—(b) Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

(c) The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition

has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

(d) The court shall require evidence as to the actual value of the property of sureties.

(e) There shall be at least two sureties upon each bond.

(f) The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

(g) Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

(h) Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

(i) Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees.

(j) Joint trustees may give joint or several bonds.

(k) If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

(l) Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

(m) Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

ACT OF 1898, CH. 1, \* \* \* § 49. **Accounts and Papers of Trustees.**— (a) The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

ACTS OF 1867 AND 1874, § 5036. The district judge at any time may, and upon the request in writing of any creditor who has proved his claim shall, require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance

and discharge of his duties; the bond shall be approved by the judge or register by his indorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the bond within such time as the judge or register orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

Statute revised — March 2, 1867, ch. 176, § 13, 14 Stat. 522. Prior Statute — August 19, 1841, ch. 9, § 9, 5 Stat. 447.

When a creditor demands it, an assignee should be required to give bond. *In re Fernberg*, 2 B. R. 353.

No one but the district judge can require the assignee to execute a bond. *In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.

The assignee should, if required, give a separate and distinct bond for each case in which he is appointed. A general bond, conditioned for the faithful discharge of his duties in all cases in which he may be appointed, is not sufficient. In Texas, a feme covert can not be a security. *In re McFaden*, 3 B. R. 104.

The register has the power to require the assignee, upon the request of creditors, to give bond, and may take testimony to determine the amount thereof. *In re Binninger & Clarke*, 9 B. R. 568.

An order requiring an assignee to give bond must specify the time within which the bond shall be filed, and if it omits to do so, the assignee can not be deemed in default for not filing a bond. *In re George E. Sands*, 7 Ben. 19.

ACTS OF 1867 and 1874, § 5037. Any assignee who refuses or unreasonably neglects to execute an instrument when lawfully required by the court, or disobeys a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

Statute revised — March 2, 1867, ch. 176, § 18, 14 Stat. 525.

A list of the creditors who have proved their claims is an instrument within the meaning of this section, and the assignee may be compelled to furnish it to the bankrupt. *In re Blaisdell et al.*, 6 B. R. 78; s. c. 42 How. Pr. 274; s. c. 5 Ben. 420.

§ 5038. An assignee may, with the consent of the judge, resign his trust and be discharged therefrom.

Statute revised — March 2, 1867, ch. 176, § 18, 14 Stat. 525.

**ACT OF 1898, CH. 5, § 46. Death or Removal of Trustees.—**

(a) The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

ACT OF 1867, § 5039. The court, after due notice and hearing, may remove an assignee for any cause which, in its judgment, renders such removal necessary or expedient. At a meeting called for the purpose by order of the court in its discretion, or called upon the application of a majority of the creditors in number and value, the creditors may, with consent of the court, remove any assignee by such a vote as is provided for the choice of assignee.

Statute revised — March 2, 1867, ch. 176, § 18, 14 Stat. 525. Prior Statutes — April 4, 1800, ch. 19, § 8, 2 Stat. 23; Aug. 19, 1841, ch. 9, § 3, 5 Stat. 442.

A motion to remove an assignee can be entertained by the court alone, and not by the register. *In re Stokes*, 1 B. R. 489; *in re New York Mail Steamship Co.*, 2 B. R. 423.

The removal of an assignee is a matter in the discretion of the court. Such discretion is, however, a legal discretion, and can only be exercised to remove an assignee when cause is shown rendering such removal expedient or necessary. *In re Blodgett & Sanford*, 5 B. R. 472; *in re Malloy*, 4 B. R. 153; s. c. 2 L. T. R. 130.

Upon a petition to remove the assignee for misconduct in instituting a suit, the question is not whether the suit was without a proper legal foundation, but whether its prosecution was fraudulent, malicious, or from unjust motive, and not in good faith for the benefit of the general creditors. *In re Sacchi*, 6 B. R. 398; s. c. 6 B. R. 497; s. c. 43 How. Pr. 250.

If one creditor becomes the sole creditor by the purchase of all the other claims, a new assignee may, upon the application of the bankrupt and such sole creditor, be substituted for the one originally elected by the creditors. *Ibid*.

An assignee is not appointed simply for his own profit, but as trustee for the creditors, and he is bound to exercise due diligence in collecting and disposing of the property of the bankrupt, and in distributing its proceeds among the creditors. If he is guilty of gross and culpable neglect of duty in this respect, he may be removed. *In re Morse*, 7 B. R. 56.

When creditors apply to an assignee to ascertain the condition of the estate, it is his duty to communicate all material facts within his knowledge, and the willful suppression of such facts is a ground for removal. *In re Perkins*, 8 B. R. 56; s. c. 5 Bess. 254.



Such removal will be made where there is an irreconcilable disagreement between the assignee and a large portion of the creditors. The assignee is a trustee of each and every creditor. He receives a compensation for his services, and is held to strict diligence in watching the interests of the creditors. The creditors are the beneficiaries of the court, and have a direct pecuniary interest in the bankruptcy proceedings. Courts of equity sometimes decree a substitution of trustees where there has been no fault on the part of the trustees. Substitution has been made where the trustees would not act together. The assignee must be allowed some discretion in the prosecution of suits, and if he believes the expense of a suit to recover property will be greater than the benefit to be derived from the suit, if successful, he ought not to proceed. The court will not constitute itself the legal adviser of the assignee. He has a right to choose his own counsel, and must proceed with his duties according to his best judgment, being held to no more than a just and reasonable accountability. Should the court direct him when to proceed in a suit, it would find that it had practically decided questions *ex parte* which ought to have been decided only on a hearing of both parties interested. In *re Mallory*, 4 B. R. 153; s. c. 2 L. T. B. 130; in *re Perkins*, 8 B. R. 56; s. c. 5 Biss. 254.

Erroneous legal advice, where the errors are so gross and frequent as to be evidence of the incompetency of the legal adviser he has chosen, may be cause for ordering the assignee to employ other counsel, but not necessarily for removing the assignee. In *re Blodgett & Sanford*, 5 B. R. 472.

After the majority of the creditors have voted to remove an assignee, the court will exercise a judicial discretion in the matter, notwithstanding the action of the creditors. Parties opposed in interest to the official action of an assignee, do not have the power to dictate his conduct, even if they happen to be able to command a majority vote of the creditors themselves. It is not the intention of the law that the majority should have the absolute control over the rights and interests of the minority. In *re Dewey*, 4 B. R. 412; s. c. Lowell, 493; s. c. 2 L. T. B. 134.

When an assignee is guilty of misconduct, the register may be directed under an order of the court, to serve a notice on the assignee to show cause why he should not be removed, and to employ counsel to represent the estate and the creditors. In *re Price*, 4 B. R. 406.

When the costs have been necessarily augmented by a charge of fraud against the assignee, they must all be paid out of the estate. He is fully justified in rebutting the charge and vindicating himself, and the estate must bear the costs. In *re Mallory*, 4 B. R. 153; s. c. 2 L. T. B. 130; in *re Blodgett & Sanford*, 5 B. R. 472.

When the assignee is removed for misconduct, he might be compelled to pay the costs of the proceedings for his removal. In *re Morse*, 7 B. R. 56.

At the meeting held under the second warrant issued in a case where an amendment has been made, after the issuing of the first warrant, adding the names of other creditors, the creditors may choose a new assignee,

and apply for the removal of any assignee that may have been elected under the first warrant. Notice of such application should be given to all creditors who have proved their debts. In *re Perry*, 1 B. R. 220; s. c. 1 L. T. B. 4; in *re Ratcliffe*, 1 B. R. 400.

The right of compelling an assignee to account is a necessary incident to the power of removal. *Lucas v. Morris*, 1 Paine, 396; in *re Comfort Sands*, 1 U. S. L. J. 15.

ACT OF 1867, § 5040. The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust, and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee.

Statute revised — March 2, 1867, ch. 176, § 18, 14 Stat. 525.

ACT OF 1867, § 5041. Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court or at its discretion by an election by the creditors, in the same manner as in the original choice of an assignee, at a regular meeting, or at a meeting called for the purpose, with such notice thereof in writing to all known creditors, and by such persons as the court shall direct.

Statute revised — March 2, 1867, ch. 176, § 18, 14 Stat. 525.

This clause more properly pertains to a vacancy caused after an assignee has been duly appointed and approved. In *re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261.

The removal of an assignee from office is necessary before another assignee can be appointed in his place. In *re George E. Sands*, 7 Ben. 19.

ACT OF 1867, § 5042. When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen.

Statute revised — March 2, 1867, ch. 176, § 18, 14 Stat. 525.

An action by a surety in a custom-house bond against the assignee of the principal does not survive against the personal representatives of the assignee. *Hall v. Cushing*, 8 Mass. 521.

Prior to the adoption of this provision, it was held that the right to prosecute an action pending at the time of the death of an assignee vested in his personal representatives. *Richards v. Md. Ins. Co.*, 8 Cranch. 84.

ACT OF 1867, § 5043. Any former assignee, his executors or administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate. And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate.

Statute revised — March 2, 1867, ch. 176, § 18, 14 Stat. 525. Prior Statute — April 4, 1800, ch. 19, § 8, 2 Stat. 23.

ACT OF 1867, § 5044. As soon as an assignee is appointed, and qualified the judge, or, where there is no opposing interest, the register shall, by an instrument (a) under his hand, assign and convey to the assignee all the estate, (b) real and personal, of the bankrupt, with all his deeds, books and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne (c) process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings.

Statute revised — March 2, 1867, ch. 176, § 14, 14 Stat. 522. Prior Statutes — April 4, 1800, ch. 19, §§ 6, 10, 11, 18, 27, 50, 2 Stat. 23, 24, 26, 28, 34; August 19, 1841, ch. 9, § 3, 5 Stat. 442.

**Assignment of the Bankrupt Estate.**—(a) The register should not make an assignment of the bankrupt's estate until he receives a certificate of the judge's approval of the assignee elected or appointed. In *re Scheiffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261.

The adjudication of bankruptcy is an essential prerequisite and precedent condition of the power of the register, to make an assignment. The adjudication is the judicial ascertainment and declaration of the fact that the debtor is legally bankrupt, upon which all the subsequent proceedings are founded. It is the act by which the court takes hold of the subject-matter, applies to its jurisdiction, and gives legal effect to what the statute declares to be an act of bankruptcy. Until that adjudication, the debtor may, in a voluntary case, withdraw his application. *Wright v. Johnson*, 4 B. R. 627; s. c. 8 Blatch. 150.

The register should make the assignment when there is no opposing interest, even though the title to the property is in dispute. In *re Wm. H. Wylie*, 2 B. R. 137.

The assignment should be handed to the clerk and recorded, and should

then be delivered to the assignee. *In re A. Alexander*, 3 B. R. (quarto) 20; s. c. 2 L. T. B. 137.

The assignment, when made by a register, should be under the hand of the register and the seal of the court. The State laws in regard to the acknowledgment of deeds need not be complied with. The only system of bankruptcy laws which Congress has the power to pass is a uniform one—one which requires the same acts and the same duties from the officers appointed to execute the law in all the States, and producing the same general results in all the States, without regard to the important differences existing in the laws of the different States. If, in preparing and passing the present system of bankruptcy laws, Congress had omitted to make any provision in regard to executing and registering the conveyances or assignments required, then the State laws would have to be conformed to. The act prescribes the forms to be observed in preparing and executing an assignment. Registers of deeds must record the same upon a certificate of the clerk of the district court that the same is a copy of the assignment on file in his office, with his seal affixed, upon demand that the same shall be recorded, and a tender to them of the fees allowed to them for such service by the laws of the State. *In re Neale*, 3 B. R. 177; s. c. 1 L. T. B. 295. *Contra*, *Zeigler v. Shomo*, 78 Penn. 357.

Although the act prescribes that as soon as the assignee is appointed and qualified, the judge or register shall, by an instrument under his hand, assign and convey all the estate, real and personal, of the bankrupt, yet this provision must be regarded as directory, and not essential to the assignment where some equally formal mode has been adopted, sanctioned by the seal of the court, which imparts verity and gives authenticity to all judicial acts of the judge. *Zantzinger v. Ribble*, 4 B. R. 724; s. c. 36 Md. 32.

The language of the statute will not be controlled or modified by any inadvertence or mistake on the part of the register in stating the time from which the assignment operates. *In re Wm. H. Pierson*, 10 B. R. 107.

**Rights of the Bankrupt.**—Until an assignee is appointed and qualified, and the conveyance or assignment is made to him, the title to the property remains in the bankrupt. *Hampton v. Rouse*, 11 B. R. 472; s. c. 22 Wall. 263.

The bankrupt has the right, prior to the appointment of an assignee, to offer to redeem property sold for taxes. *Ibid*.

Under the act of 1841, the decisions were conflicting as to whether the title of the assignee related back farther than the decree. *Berthelon v. Betts*, 4 Hill. 577; *in re John Ziegenfuss*, 2 Ired. 463; *Miller v. Black*, 1 Penn. 429; *Smith v. —*, 4 Edw. Ch. 653; *Spaulding v. Dixon*, 21 Vt. 45; *in re Anon.*, 1 Penn. L. J. 323; *in re Bennet*, 1 Penn. L. J. 145; *in re Dudley*, 1 Penn. L. J. 302. *Vide in re Mellor & Co.*, 1 Penn. L. J. 135; *McLean v. Rokey*, 3 McLean, 235; *Buckingham v. McLean*, 3 McLean, 185; s. c. 13 How. 151; *in re Newhall*, 2 Story, 360; *in re W. C. H. Waddell*, 1 N. Y. Leg. Obs. 53; *in re Samuel Harris*, 3 N. Y. Leg.

Obs. 152; in re Abner H. Allen, 1 N. Y. Leg. Obs. 115; s. c. 5 Law Rep. 362; in re Elam Rust, 1 N. Y. Leg. Obs. 326.

The intent and purport of this provision is that the property which was the property of the bankrupt at the time of the filing of the petition in bankruptcy, and no other property, shall vest in the assignee. Property acquired by the bankrupt after the petition is filed belongs to the bankrupt alone. In re Patterson, 1 B. R. 125; s. c. 1 Ben. 508; in re Barnett, 16 Pitts L. J. 73; in re Levy et al., 1 B. R. 136; s. c. 1 Ben. 496; in re Rosenfield, 1 B. R. 319; s. c. 1 L. T. B. 81; *Rugely v. Robinson*, 19 Ala. 404; *Bond v. Baldwin*, 9 Ga. 9; *Deadrick v. Armour*, 10 Humph. 588.

A debtor has no right to reserve from his estate a sum of money sufficient to meet the expenses of procuring his discharge. In re James Thompson, 13 B. R. 300.

If the debtor does not set up the bar of the limitation, the bankrupt can not claim the money after a recovery on the ground that it did not belong to the assignee. *Maybin v. Raymond*, 15 B. R. 353; s. c. 4 A. L. T. (N. S.) 21.

The earnings and acquisitions of the bankrupt subsequent to the commencement of the proceedings are his own, subject to his eventual discharge. If he does not succeed in procuring that, they remain liable to execution or attachment by his former creditors. *Mays v. Manufacturers' National Bank*, 4 B. R. 446; s. c. 4 B. R. 600; s. c. 64 Penn. 74.

When the contract of an attorney is that of an ordinary retainer to conduct a cause, he is entitled to be paid for his services as he renders them. For the services rendered before the filing of his petition he had a claim upon his clients, and that passes to his assignee, but for the value of services subsequently rendered in the cause, he is entitled to retain the compensation. In re Jones, 4 B. R. 347.

If the stock has not been transferred on the books of the corporation, the bankrupt, with the consent of the assignee, may vote thereon at a meeting of stockholders. *State v. Ferris*, 42 Conn. 560.

If the bankrupt's wife takes out a policy of insurance upon her life, payable upon her death to her husband, paying one premium out of her separate estate before the commencement of proceedings in bankruptcy, and others afterward, without a claim to the policy being made by the assignee, the money upon her death belongs to her husband, and not to his assignee. In re Owen & Murrin, 8 B. R. 6; s. c. 2 Dillon, 120.

The moment the petition is filed, the bankrupt is civilly dead. During the interval existing between the filing of the petition and the appointment of the assignee, a condition of things exists not unlike that in the case of a person dying intestate and before the appointment of an administrator. On the death of a person intestate, no one is authorized to dispose of or assign his assets. A bankrupt is civiliter mortuus from the day on which he files his petition, and during the interval between the filing of his petition and the appointment of the assignee no assignment of his assets can be made. *Johnson v. Gelsriter*, 26 Ark. 44; *Barron v. Newberry*, 1 Biss. 149.

The expression that a bankrupt is civiliter mortuus means that he is

dead only as to the control of his old property and contracts. His assignee stands like an administrator in respect to these. But the bankrupt is still alive for other purposes in law, as he is in fact. He is alive to acquire new property, to do and to receive wrong, to commit trespasses or crimes, and to be prosecuted for either, and to prosecute for either when committed on himself. *Carr v. Gale*, 3 W. & M. 38; s. c. 2 Ware, 330.

The bankrupt may, after the commencement of the proceedings in bankruptcy, enter into business and hold property, subject to the contingency of obtaining a discharge. In *re Benjamin B. Grant*, 2 Story, 312.

An agreement signed by the bankrupt after the commencement of proceedings in bankruptcy is a nullity so far as the estate is concerned. In *re Geo. W. Anderson*, 9 B. R. 360.

By the bankruptcy act the records of the court in bankruptcy are always open for inspection, and it is not until the petition is filed in court that the statute declares that the property shall be divested. The fact is, therefore, within the means of knowledge of any one dealing with another, if he will take the trouble to consult the records of the court. It is a record of the same public nature as the registry of deeds. The record of a deed is legal notice to all parties interested, and, in the same manner, Congress has enacted that the filing of the petition in court shall be conclusive upon the rights of all parties, and from that time the bankrupt shall have no control or disposition of the property formerly belonging to him. Any subsequent conveyance or transfer by him is a nullity, and absolutely void as against the assignee. This assignment is subsequently executed, but its effect must depend entirely on the language of the act, and it is expressly enacted that the assignment, when made, shall relate back to the commencement of the proceedings, which is declared to be the filing of the petition. Parties must, in law, be deemed to have constructive notice of the filing of the petition, and of its effects under the operation of the bankruptcy law. In *re Gregg*, 3 B. R. 529; s. c. 1 L. T. B. 298; *Mays v. Manufacturers' National Bank*, 4 B. R. 416; s. c. 4 B. R. 660; s. c. 64 Penn. 74; in *re J. J. Lake*, 6 B. R. 542; s. c. 3 Biss. 204; *Perley v. Dole*, 38 Me. 558; *Oakey v. Corry*, 10 La. An. 502.

If the notice that a warrant has been issued, and that the payment of any debts to the bankrupt is forbidden by law, is published, as required by the act, it is binding upon all persons, whether they have or have not actual knowledge thereof, and any subsequent payment to the bankrupt will not discharge the debt, nor afford any greater protection than if it had been made to any other person not authorized to receive it as against the assignee. *Stevens v. Mechanics' Savings Bank*, 101 Mass. 109.

When the debtor of a bankrupt, in good faith and without knowledge or notice of the proceedings in bankruptcy, pays him a debt after the commencement of such proceedings, he can be compelled to pay it over again to the assignee. *Mays v. Manufacturers' National Bank*, 4 B. R. 416; s. c. 4 B. R. 660; s. c. 64 Penn. 74.

The burden of proving that the property did belong to the bankrupt prior to the filing of the petition rests upon the assignee. *Ibid.*

A purchaser of negotiable paper, who is domiciled in the district where the proceedings in bankruptcy are pending, is concluded by the notice given to him by the records of the bankruptcy court, and can not claim to be an innocent purchaser. *In re J. J. Lake*, 7 B. R. 542; s. c. 3 Biss. 204.

If the sheriff, after the commencement of proceedings in bankruptcy, levies an execution upon and sells the bankrupt's property, he is liable to the assignee, although he pays the proceeds of the sale to the execution creditor before he receives actual notice of the bankruptcy. This principle does not involve any conflict between the State courts and the Federal courts. If the property is no longer liable to levy for the satisfaction of the judgment, it is no matter of conflict between the one court and the other, which of them is called upon to recognize or administer the law. *Miller v. O'Brien*, 9 B. R. 26; s. c. 9 Blatch. 270.

Payments made after the filing of the petition in bankruptcy, mala fide, or with a view of defeating the bankruptcy act in any of its essential requirements, are void, and the person by whom such payment is made can be held to answer to the original demand to the assignee. *Babbitt v. Burgess*, 7 B. R. 561; s. c. 2 Dillon, 160; *Turner v. Shenkmyer*, 1 W. N. 266.

If the bankrupt passes a note to another before the commencement of the proceedings in bankruptcy, with the intent thereby to transfer the property, but omits to indorse it, he may indorse it after that time. *Smoot v. Morehouse*, 8 Ala. 370.

Where the right to use an alley is reserved in a deed so long as the grantor shall continue to own an adjoining piece of land, the right is not terminated by the grantor's bankruptcy, if the proceedings are settled, and the property reconveyed to him by the assignee. *Colie v. Jameson*, 13 B. R. 1; s. c. 6 N. Y. Supr. 576; s. c. 11 N. Y. Supr. 284.

A party who borrowed property from the bankrupt, after the commencement of the proceedings in bankruptcy, can not defeat an action to recover the same by proof that it passed to the assignee, without connecting himself with the assignee's title. *Lain v. Gaither*, 72 N. C. 234.

**Acts of Third Parties to the Estate.**—A creditor can not, by a bill in equity, obtain payment out of property which passed to the assignee. *McCabe v. Cooney*, 2 Sandf. Ch. 314.

If a creditor's bill is filed after the commencement of the proceedings in bankruptcy, the objection that the property belongs to the assignee must be taken by the assignee, and not by the debtor. *Smith v. —*, 4 Edw. Ch. 653.

A judgment creditor can not file a bill in equity, alleging that an execution has been issued on the judgment and returned unsatisfied, and seek to have property alleged to have belonged to the bankrupt prior to the commencement of the proceedings in bankruptcy applied to the payment of his judgment in preference to the claims of the other creditors. *Haxtun v. Corse*, 4 Edw. Ch. 585; s. c. 2 Barb. Ch. 506; *Kane v. Pilcher*, 7 B. Mon. 651.

A party who holds funds or property belonging to the bankrupt may,

in an action brought by a creditor to subject the same to the payment of his debt, plead that the assignee alone has the right to claim the same. *David v. Ferrand*, 2 La. An. 596.

A plea by a third party to show that the property vested in the assignee, must show that the district court had jurisdiction to entertain the petition, and that the requirements of the act were complied with. *Seaman v. Stoughton*, 3 Barb. Ch. 344.

Where a petition for a partition merely alleges that the petitioner claims title under an attachment, a plea of the bankruptcy of the defendant prior to the issuing of the attachment, without averring that the attachment was issued against him, is insufficient. *Union v. Clark*, 18 Vt. 363.

**What Property Vests in the Assignee.**—(b) The expression, "estate of a bankrupt," means such property and rights of property of the bankrupt as the bankruptcy act vests in the assignee. The assignee can not take anything more than the bankrupt himself had, in any case, except the case of a fraudulent conveyance by the bankrupt. In *re Ham-bright*, 2 B. R. 498; s. c. 2 L. T. B. 61; s. c. 1 C. L. N. 201.

The words, "all the estate real and personal," are broad enough to cover every description of vested right and interest attached to and growing out of property. Under such words, the whole property of a testator would pass to his devisee. *Comegys v. Vasse*, 1 Pet. 193; s. c. 4 Wash. 570.

The language of the statute is sufficiently comprehensive to embrace the most minute and temporary interest in property. *French v. Carr*, 7 Ill. 664.

Every definition of property ignores the idea of value in the thing owned. If there is an exclusive right to a thing, the law immediately presumes it to have at least a nominal value to the owner. *Kinzie v. Winston*, 4 B. R. 21; s. c. 56 Ill. 56.

The assignment vests the property in the assignee, although it was not placed on the bankrupt's schedules. *Holbrook v. Coney*, 25 Ill. 543; *Burton v. Lockert*, 9 Ark. 411; *Jewett v. Preston*, 27 Me. 400.

A certificate of title to a burying vault, granted by a corporation whose charter limits its use to the interment of the dead, and declares that it shall not be reached by private creditors nor for public dues, is no more than a license to the bankrupt to hold personally the privilege of sepulchre for his friends, and does not pass to the assignee. The interest is no more than the charter generates or declares, and the charter denotes a purpose to separate this acquisition from the estate or property of the holder. In *re Abner S. Ely*, 1 N. Y. Leg. Obs. 131.

The title to real estate situated in a foreign country does not vest in the assignee, for a statutory conveyance can have no extraterritorial effect upon real estate. *Oakey v. Bennett*, 11 How. 33; *Barnett v. Pool*, 23 Tex. 517.

Where the services have been rendered by the bankrupt, the right to the compensation passes to the assignee, although it depends on a contingency. *Burton v. Lockert*, 9 Ark. 411.



The right to redeem property sold under an execution passes to the assignee, and can not be exercised by any judgment creditor after the commencement of the proceedings in bankruptcy. *Pillow v. Langtree*, 5 Humph. 389.

If the rights of the debtor and of a creditor to redeem property sold under an execution are distinct and independent, the right of the creditor is not defeated by the bankruptcy of the debtor, but is a right or incident attached to the judgment, and may be deemed a part of its lien. *Trimble v. Williamson*, 49 Ala. 525.

A claim for improvements made on the public lands of the United States passes to the assignee. *French v. Carr*, 7 Ill. 664.

A franchise consisting of a right to take tolls for crossing at a bridge is property that passes to the assignee. *Stewart v. Hargrove*, 23 Ala. 429.

A receiver appointed under a creditor's bill in a State court, can not enter another political jurisdiction and claim a fund allowed on a claim against a foreign government in preference to an assignee appointed in proceedings instituted after the filing of the bill. *Booth v. Clark*, 17 How. 322.

If a party in pursuance of a decree delivers property of a bankrupt to a receiver before any notice or demand by an assignee, the surrender is a complete defense to any future action by the assignee. *Long v. Converse*, 91 U. S. 105.

If by the terms of the trust, the income of a certain fund is to be paid to the bankrupt or his wife, to be applied to the support of the bankrupt, his wife and children, the assignee is not entitled to any part thereof. *Durant v. Mass. Hosp. L. Ins. Co.*, 15 A. L. J. 436.

As soon as a will of real or personal estate is admitted to probate, the title of the legatee or devisee takes effect by relation from the death of the testator. If the devisee or legatee is declared a bankrupt in proceedings commenced after such death and before the probate of the will, the legacy or devise will pass to his assignee if he has never renounced or disclaimed the legacy or devise. After the commencement of the proceedings in bankruptcy he has no right to disclaim or renounce it. In *re Henry W. Fuller*, 2 Story, 327.

If the bankrupt was entitled to a distributive share in the estate of a deceased person, and was also indebted to that estate, the assignee can only claim the balance that remains after deducting the debt from such distributive share. In *re Newhall*, 2 Story, 360.

A devise of property to cease on the bankruptcy of the devisee is good, and the limitation valid. *Nichols v. Eaton*, 13 B. R. 421; s. c. 91 U. S. 716.

If a will confers an absolute discretion on a trustee which he is under no obligation to exercise in favor of the bankrupt, it does not grant such an interest to the latter as his assignee can assert. *Ibid.*

A devise of property to a trustee, to pay the income thereof to a third person free from liability for his debts, is not such an interest as will pass to the latter's assignee. *Ibid.*

Where a will devises property to trustees to hold until the devisee

reaches a certain age, the estate passes to the assignee of the devisee, although the devisee had not attained that age at the time of the commencement of proceedings in bankruptcy. *Sandford v. Lackland*, 2 Dillon, 6.

If an estate is devised to A., subject to the payment of a certain sum to B. in trust for C., A. is not a trustee for C. By the terms of the devise, B. is the person in whom the trust is reposed, and is the direct trustee, made so by the act and choice of the devisor. If A. becomes a trustee, he will only be an implied trustee. The statute of limitations will run in favor of a party who enters into possession of property in his own right and holds for his own benefit, but whose title is subsequently, by matter of evidence or construction of law, turned into that of trustee. In re A. G. O'Neale, 6 B. R. 425.

If a mortgagee devises his interest in the land on which he holds a mortgage, to the mortgagor and others, this will pass the mortgage debt, and the mortgagor's interest therein will pass to his assignee. *Clark v. Clark*, 56 N. H. 105.

A claim to indemnity for an illegal capture of a vessel by a foreign government passes by abandonment to the insurer, and upon his bankruptcy vests in his assignee. *Comegys v. Vasse*, 1 Pet. 193; s. c. 4 Wash. 570; *Phelps v. McDonald*, 2 McArthur, 375.

If money is to be paid under a treaty to a foreign government on account of a claim due to a bankrupt, the court has no jurisdiction to compel the bankrupt to make an assignment thereof. *Phelps v. McDonald*, 2 McArthur, 375.

If the surety, upon a note given to a guardian, marries the ward, his assignee can not maintain an action against the maker before a settlement and adjustment of the guardian's account. *Chilton v. Cabiness*, 14 Ala. 447.

Property which has been transferred by a deed contrary to law will pass to a trustee appointed under a deed of trust subsequently executed, and when such deed was made more than six months prior to the commencement of proceedings in bankruptcy, and is not assailed as fraudulent, no claim to the property vests in the assignee. *Stewart v. National Union Bank et al.*, 2 Abb. C. C. 424.

When an execution attachment is laid in the hands of a tenant for a term of years under rent reserved, payable quarterly, and the owner of the reversion is adjudged a bankrupt, after the laying of the attachment, but before the rent becomes due, the attachment will not bind the rent. The rent which had not fallen due was an incident of the reversion, followed it, and passed with it to the assignee. There was, therefore, no debt of the bankrupt for the attachment to operate upon. When the rent became due it belonged to the assignee. A levy upon the reversion would have fastened upon the rent as its incident. *Evans v. Hamrick*, 61 Penn. 19.

The growing crop passes to the assignee, and should be placed upon the schedules as personal property. In re Schumpert, 8 B. R. 415.

A franchise to construct a turnpike road and collect the tolls thereon is a personal trust, not assignable without the consent of the granting power, and does not pass to the assignee by virtue of the assignment. The assignee can take nothing which the bankrupt could not voluntarily assign. *People v. Duncan*, 41 Cal. 507.

Where an instrument executed at the same time with an absolute deed, declares that the grantee holds two-thirds of the estate for others, the assignee of the grantee is only entitled to one-third. *Ford v. Belmont*, 7 Robt. 97, 508; s. c. 35 N. Y. Supr. 135.

A purchaser, at a sale under a fl. fa. of a debtor's interest in a firm, only acquires his interest in the chattels actually seized, and the interest in the credits passes to the assignee. *Moore v. Rosenberger*, 7 Phila. 576.

A purchaser of firm property at a sale under an execution against an individual partner, obtains only the interest of such partner in the surplus that may remain after the firm debts are paid. *Osborn v. McBride*, 16 B. R. 22; s. c. 3 Saw. 570.

The fact that the purchaser obtains the interest of both partners on separate executions, does not enlarge the interest acquired on the separate interest against either. *Ibid.*

On an individual petition, property in the possession of the bankrupt at the time of the commencement of proceedings in bankruptcy, which belongs to a firm of which he has been a member, passes to the assignee, who will hold as tenant in common with the solvent partner. *In re Beal*, 2 B. R. 587; s. c. Lowell, 323; s. c. 2 L. T. B. 95.

A legal possibility is an estate founded on a contingency. The fee-simple title to a street, with the right to accretions thereto, is not in the eye of the law a possibility, for the estate is not founded on a contingency. *Kinzie v. Winston*, 4 B. R. 21; s. c. 56 Ill. 56; *Banks v. Ogden*, 2 Wall. 58.

The bankrupt is personally released by a discharge, but the property and rights of property vested in the assignee are subject to the creditors, and are held in trust for them in whatsoever hands these may be found. *Clark v. Clark*, 17 How. 315.

The statute does not create any estate of inheritance in the assignee himself, although he may by his official action convey lands. Whatever rights vest in him are official, and not personal, and are not heritable or corporate. *Steevens v. Earles*, 25 Mich. 40.

Assignees in bankruptcy do not, like heirs and executors, take the whole legal title in the bankrupt's property. They take such estate only as the bankrupt had a beneficial, as well as legal, interest in, and which is to be applied for the payment of his debts. *Rhoades v. Blacklston*, 106 Mass. 334; *Blin v. Pierce*, 20 Vt. 25; *Ontario Bank v. Mumford*, 2 Barb. Ch. 596; *Hynson v. Burton*, 5 Ark. 492.

The assignee can not have a sale made by a trustee in insolvency for a nominal consideration set aside if it was made in good faith and the value of the property was not equal to the debts due by the estate. *Goldsmith v. Hapgood*, 1 Holmes, 454.

If the assignee forecloses a mortgage which the bankrupt had fraudulently taken with the funds of another and receives the money, the

fraudulent grantor's creditors can not recover the money from the assignee. *Alken v. Edrington*, 15 B. R. 271.

A certificate of membership in a board of trade where no profits are given to the members further than what is derived from the incidental use made by a member of the privileges which his membership gives him, is a mere personal privilege, and does not pass to the assignee. In *re Israel Sutherland*, 6 Biss. 526.

**Rights under Contracts.**—In general, the assignee does not stand in a better predicament than the bankrupt himself, and can claim only what the latter might claim. *Winsor v. Kendall*, 3 Story, 507; *Fiske v. Hunt*, 2 Story, 582.

A transfer of an attorney's receipts entitles the party in equity to the proceeds of the judgment, and the title to the judgment does not pass to the assignee. *Anderson v. Miller*, 15 Miss. 586.

The interest and rights of the bankrupt under contracts are transferred to the assignee. Whatever the rights are, the assignee can claim and enforce. It is not the purpose of the bankruptcy law to interfere with or avoid contracts made by the bankrupt with other parties, or to prevent their execution. *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137.

If goods are actually delivered to the vendee, the vendor has not independent of any special agreement, any lien entitling him to claim or hold the goods as against the assignee of the vendee. If there is a special agreement, he must abide by the actual agreement made. If the instrument is not effectual by reason of the failure of the vendor to do what is by law necessary for his protection, he can not fall back upon any supposed or possible agreement qualifying the delivery, and securing a lien for the price. In *re Simeon Leland et al.*, 10 Blatch, 503.

An agreement that the title to property sold to the bankrupt should not vest in him until all the purchase money had been paid, binds the assignee, even if the bankrupt has paid all but a small portion of the purchase money. The ownership remains in the vendor until the final payment. Creditors can not enforce their claims without paying to the vendor the remaining portion. In *re J. H. Lyon*, 7 B. R. 182; s. c. 4 C. L. N. 421.

The condition that the title shall not vest in the vendee until all the purchase money is paid, is not waived by taking indorsed notes from the vendee. *Ibid.*

Where the sale is absolute, the vendor can not claim the property from the assignee. *Woods v. Oakman*, 116 Mass. 599.

A contract to deliver and set up scales and receive a note and security on the scales for the price, is entire, and no note or security can be demanded until the scales have been all delivered and set up, and, until so delivered and set up, and the note and security given, the property in the scales does not pass to the vendee, unless there is a waiver of the conditions. The assignee of the vendee can claim no greater rights in the scales than the vendee had. In *re Pusey*, 6 B. R. 40.

The delivery of the goods to the marshal who is in possession of the

store of the vendee under a warrant does not terminate the right of stoppage in transitu. *Sutro v. Holle*, 2 Neb. 186.

If the delivery of a note in payment for the goods is a condition of the sale, a delivery to the marshal who is in possession of the vendee's store under a warrant, is not a waiver of the condition, and the vendor is entitled to the goods. *Ibid*.

If the debtor at the time of the purchase did not believe or expect that the goods would ever be paid for, the vendor may reclaim them on the ground of fraud, and has a better title than the assignee. *Donaldson v. Farwell*, 5 Biss. 451.

In order to render a sale void as against the assignee, the vendor must show a fraud which enters into and forms a part of the purchase. If the purchase was made without fraud and in good faith, the mere fact that the bankrupt had concealed a crime committed by him, the exposure of which would render him insolvent, does not make a purchase voidable. *Comins v. Coe*, 117 Mass. 45.

If a warehouse receipt is sent by mail to a creditor who has not previously agreed to accept grain in payment of his debt, and is received by him after the commencement of the proceedings in bankruptcy, the assignee is entitled to recover the grain, although the receipt was mailed before the commencement of the proceedings. *Brooke v. Scoggins*, 11 B. R. 258; s. c. 9 Pac. L. R. 12.

Where the vendor reserves the right to take possession of the chattels in case of the nonpayment of the purchase money, and does take possession before the commencement of the proceedings in bankruptcy, his title is valid, although the right was reserved in a mortgage which was not recorded. *Field v. Baker*, 11 B. R. 415; s. c. 12 Blatch. 438.

If the goods are detained in the course of transportation and deposited in a warehouse, the giving of a conditional authority to the warehouseman to sell is not such an assumption of possession as to terminate the right of stoppage in transitu. *In re Norman B. Foot*, 11 B. R. 153; s. c. 11 Blatch. 530.

The acceptance of a delivery order by a warehouseman where the goods are in a bonded warehouse and the duties thereon are unpaid, is not a sufficient acceptance of the goods within the statute of frauds, and the vendor, if the price remains unpaid, has a better title than the assignee of the vendee. *In re George Clifford*, 2 Saw. 428.

If the vendor has complied with his part of the contract, the assignee of the vendee can not recover the partial payments made by the vendee where the vendor has sold the property to another in consequence of the vendee's default. *Kane v. Jenkinson*, 10 B. R. 316.

If the vendor has been in no manner in fault, he may, in an action by the assignee to recover partial payments made by the vendee, recoup the damages which he may have suffered in consequence of the nonperformance on the part of the purchaser. *Ibid*.

Where the depositor of grain in a grain elevator knows that by the custom of the trade it will be mingled with other grain and its identity lost, the bulk in the elevator being subject to constant fluctuations, and

that he has only the right to call for an equal amount of grain or the value thereof, the transaction constitutes a sale and not a bailment, and he can not claim the grain in the elevator at the time when the warehouseman becomes bankrupt. *Rahilly v. Wilson*, 3 Dillon, 420; s. c. 5 C. L. N. 217.

If a miller converts grain deposited with him to his own use, the depositor has no interest in other grain owned by the miller. His only interest is that of a general creditor of the estate. *Adams v. Myers*, 1 Saw. 306.

A party can not recover specific property from the assignee, unless it possesses indicia or earmarks by which it may be distinguished from all others of the same description. *Wood M. & R. Co. v. Brooke*, 9 B. R. 395.

An agreement concerning the sale of specific and ascertained chattels is *prima facie* a bargain and sale, and transfers the property therein to the purchaser in consideration of his becoming bound to pay the price therefor, and the vendor can not reclaim the property, unless he proves that there was an agreement that the title should not pass until payment should be made therefor. *Ibid.*

A bond under seal, with coupons attached, is a negotiable instrument if it is made payable to bearer, and a purchaser in good faith for a valuable consideration obtains a good title against the assignee. *In re Simeon Leland et al.*, 6 Ben. 175.

If parties by their bond, given on the dissolution of a firm, covenant to indemnify the retiring partner, and to pay the firm debts, the right of action will vest in his assignee, although he receives a discharge, for the covenant is to pay as well as indemnify. *Hood v. Spencer*, 4 McLean, 168.

If an attorney and a debtor agree that an assignment shall be made of dividends to be received from an estate of which the former is assignee, to be credited upon an account held by him against the debtor for collection, the assignee of the debtor may recover the money, if he is declared a bankrupt before the assignment of the dividends is made or the dividends credited upon the claim, for the courts can not enforce such loose, incomplete, and unexecuted contracts. *Foster v. Lowell*, 4 Mass. 408.

If the bankrupt transferred his property to another under an agreement that the latter should sell it and apply the proceeds to pay the former's debts, the bankrupt has a beneficial interest in the agreement, which passes to his assignee, and the assignee may bring a suit on the agreement. *Steele v. Aylsworth*, 18 Conn. 244.

Where the right to a conveyance under a bond has been forfeited by a failure to comply with its terms, the right which the bankrupt may acquire after the commencement of the proceedings in bankruptcy by a waiver of the forfeiture, will not pass to the assignee. *Kittridge v. McLaughlin*, 23 Me. 327.

Although the assignment of a bond is made and signed by the obligee, yet if it is never accepted, either actively or constructively, by the party

to whom it was to be assigned prior to the commencement of the proceedings in bankruptcy, the bond will pass to the assignee. *Perley v. Dole*, 38 Me. 558.

If a party buys a judgment against the bankrupt, and purchases land at a sale under an execution issued thereon, under a parol agreement that out of the proceeds he shall retain a debt due to him and the money paid to purchase the judgment, and pay the balance to the bankrupt, the agreement is without consideration. *Hyde v. Findlay*, 8 Pac. L. R. 147.

Under the warrant, the marshal has the right to take possession of personal property leased by the bankrupt. If the lease stipulates that the lessor may take possession of the property whenever he deems himself unsafe or the property not well taken care of, the lessor must show that fact in order to entitle himself to take the property. *Hathaway v. Quimby*, 1 N. Y. Supr. 386.

If the assignee sells the equity of redemption in realty, to which fixtures are attached, for a sum equal to the value of the fixtures, he must be considered to have received it for the fixtures, clear of the mortgage. The owner of fixtures can, in writing, and for a valuable consideration, convey severable chattels in such a way as to bind himself and his assignee in bankruptcy at least, and if he has done so, the grantee will be entitled to the proceeds. *In re McKay & Aldus*, 7 B. R. 230; s. c. *Lowell*, 561.

An agreement that a building erected upon land owned by the bankrupt shall be considered personal property, may be shown by inference from the subsequent recognition of rights which can result only from its existence. A purchaser from the assignee, with notice of the facts, can make no better title than the assignee, notwithstanding the representations made by the latter. *Morris v. French*, 106 Mass. 326.

The bankrupt having been directed to invest a certain sum of money in stock for a party, purchased the stock in his own name, and hypothecated it for money loaned to him. Being embarrassed, he deposited securities in the hands of another, to be used for the purpose of purchasing or replacing the stock, and these securities were subsequently sold, but the stock could not be repurchased. The securities, whose sale resulted in the proceeds in question, never belonged to the party, and were not, prior to the time when the rights of the assignee in bankruptcy intervened, put into the hands of the party, or any agent of his, or of any person, with his assent or privity, nor was the placing of such securities in the hands of the bailee made known to the party, or adopted or ratified by him prior to the transfer of the title to them to the assignee in bankruptcy. The property in them was in no manner changed, nor did any legal or equitable lien, or interest, or trust, or charge arise in respect to them which would not have been revocable by the bankrupt himself; at least, at all times before the transaction was made known to the party. It was not made known to him, or to any agent of his, until some time after the appointment of the assignee in bankruptcy, and such appointment must be considered a revocation of anything done by the bankrupt, if such revocation were needed. Moreover, the delivery of the securities having been made

for a specified purpose, and the purpose not having been carried out, the property in the securities remained in the bankrupt, and passed to his assignee free and clear from any charge in favor of the party. *Unge- witter v. Von Sachs*, 3 B. R. 723; s. c. 4 Ben. 167; s. c. 1 L. T. B. 224; s. c. 3 L. T. B. 195.

To succeed in a suit for the recovery of property, the assignee must show title in himself. When the bankrupt has formed a bank with other associates, but is himself the sole owner, the assignee is not entitled to its assets as against a receiver appointed under a State law relating to insolvent banks. The making, recording, and filing of the certificate of the organization, and the acts of user under it, must be held to be sufficient to establish the existence of the bank as a corporation, as against the associates and third persons. *Goodrich v. Remington*, 6 Blatch. 515.

A covenant in a lease that fixtures shall not be removed until the rent is paid, binds the assignee. The act of affixing them to the freehold takes them out of the category of chattels, and is notice to creditors and to all the world that the right of removal will depend on the contract between landlord and tenant. The right of a tenant to remove trade fixtures may well enough be called rather a privilege than property, and it is one that he may lawfully waive or modify by the terms of the lease, without the form of either a pledge or a mortgage. *In re J. H. Morrow*, 2 B. R. 665; s. c. Lowell, 386.

An agreement that chattels on the premises shall be at the disposal of the lessor as security for rent, is not valid against creditors of the lessee before entry, where distress for rent is not allowed. The bankruptcy law does not undertake to enforce a mere covenant of this kind, which by the law of the place creates no valid lien. *Ibid*.

If the bankrupt, by the terms of the lease, merely has the right to possess and enjoy the use of the property, without any power to convey it to a third person unless the lessor consents, the estate will not pass to the assignee. *In re Michael O'Dowd*, 8 B. R. 451.

Property owned by the bankrupt, and used in carrying on business in the name of another, will pass to the assignee, free from all claims to priority for debts contracted in such business. There can not be any fair suggestion of considerations of supposed hardship to such third person. If he choose to suffer himself to be involved in debts incurred in carrying on the bankrupt's business in order to cover it against former creditors, those former creditors ought not, for this reason, to be postponed in the distribution of such property to other creditors, whose debts may have been afterward contracted in his name. Nor, in case of his death, are there any equities in favor of the creditors of his estate, against the interests of the general body of the bankrupt's creditors. *In re Wm. H. Long*, 3 B. R. (quarto) 66.

The assignee of a bankrupt corporation may sue stockholders to recover unpaid subscriptions sufficient to meet all the debts and liabilities of the corporation. *Payson v. Stoecker*, 2 Dillon, 427.

The estate of the bankrupt is not liable for the tortious acts of the assignee. *Adams v. Meyers*, 1 Saw, 206.



At common law the termination of all interest of the insured in the property defeats the policy. The transfer to the assignee in bankruptcy terminates all interest of the bankrupt in the property insured. A transfer to an assignee in bankruptcy is within the terms of a provision of the policy, which declares that the policy shall be void in case of any change or transfer of the title to the property insured.\* The fact that the bankruptcy is involuntary, or that the transfer is made by operation of law, is immaterial. *Starkweather v. Cleveland Ins. Co.*, 4 B. R. 341; s. c. 2 Abb. C. C. 67; *Perry v. Lorillard Ins. Co.*, 14 B. R. 339; s. c. 6 Lans. 201; s. c. 61 N. Y. 214.

The assignee of a bankrupt insurance company may recover upon a note given for the payment of the annual premium upon a policy issued by the company to the maker. *Carey v. Nagel*, 2 Abb. C. C. 156; s. c. 2 Biss. 244.

An insured who has given a note for the premium can not surrender the policy and have the note delivered to him upon paying the amount due for the time that the policy has run, for there is no implied contract that he shall have the right to surrender the policy and receive back a portion of the premium as unearned. *In re Western Ins. Co.*, 6 Ben. 150.

If the drawer of a check becomes bankrupt before the presentation and acceptance thereof by the bank, the holder is not entitled to any priority as against the assignee. *In re Charles A. Smith*, 15 B. R. 459; s. c. 2 C. L. B. 119.

A party who gave his check to the bankrupt on account of a debt due to him, is not liable to an action by the assignee for the original debt without a surrender of the check, although he stopped the payment thereof, and it has been outstanding for a long time. *Woodin v. Frazee*, 38 N. Y. Supr. 190.

Where a party advances money to a corporation upon an agreement that he shall collect certain calls on its stockholders and apply them to the debt, and in pursuance of this agreement receives a list of the stockholders, and the amount due from each, this is an equitable assignment of the calls that is not defeated by the subsequent bankruptcy of the corporation. *Farmers' & Drovers' Savings Bank v. Publishing Co.*, 3 Dillon, 287.

If a note is discounted by a bank, and the proceeds credited to the account of the depositor, which is then overdrawn, he will not, upon subsequently making his account good by other deposits, be entitled to demand the drafts received for the note from the bank or its assignee, although the note was also taken for collection. *In re Bank of Madison*, 9 B. R. 184; s. c. 5 Biss. 515.

A party dealing with an insolvent bank in the ordinary way must make out a very clear case before a court will sustain a preference in his favor over other creditors. *Ibid.*

A banker, in receiving a note for collection from one of his customers, does not act as an agent, but is presumed to undertake the collection for the profit that may result from the deposit and use of the money. When he collects money for his customer, it is regarded as deposited, and in

the light of any other deposit, not as the money of the customer, nor is the customer entitled to it, but only to its equivalent as any other deposit. If the collection is remitted by a draft, the customer is not entitled to demand the draft from the banker or his assignee. *Ibid.*

A draft drawn for a part of a fund in bank is not an equitable assignment of the money, and does not entitle the holder to a priority of payment out of such money in the hands of the assignee. *Bank of Commerce v. Russell*, 2 Dillon, 215; *Randolph v. Canby*, 11 B. R. 276; *Dickey v. Harmon*, 1 Cranch C. C. 201; *Walker v. Selgel*, 12 B. R. 394; s. c. 2 Cent. L. J. 508.

If a party draws a check for a sum in bank, which is presented after he has made an assignment to a trustee for the benefit of creditors, the assignee, if the trustee subsequently transfers all his rights under the assignment to him, may recover the sum from the bank, although the latter holds a note not due at the time of the assignment or the commencement of the proceedings in bankruptcy. *First National Bank of Mount Joy v. Wilson*, 72 Penn. 13.

If the bankrupt has his note discounted and leaves the proceeds on deposit, the holder in good faith and for value of a check, which was presented for payment before the maturity of the note and before the commencement of the proceedings in bankruptcy, is entitled to be paid out of the proceeds. *Fourth National Bank v. City National Bank*, 10 B. R. 44; s. c. 68 Ill. 398; s. c. 1 A. L. T. (N. S.) 386.

If an agent procures the discounting of a draft upon the bankrupt, at a time when the latter has determined to stop payment, and the package of notes delivered to the agent on such draft is intercepted before delivery to the bankrupt, and the contract rescinded, the assignee has no title to the notes. *Purviance v. Union Nat'l Bank*, 8 B. R. 447; s. c. 21 Pitts. L. J. 33; s. c. 30 Leg. Int. 392.

If an order for the whole of a fund is given for a valuable consideration to a third person prior to the commencement of the proceedings in bankruptcy, it amounts to an equitable assignment of the fund, although the drawee did not accept the order, and the right to the fund does not pass to the assignee. *Blin v. Pierce*, 20 Vt. 25.

If the holder of an order on a general fund, the acceptance whereof has been refused, proves his claim, he will be restrained from subsequently prosecuting a suit against the holder of the fund in a State court. *Walker v. Selgel*, 12 B. R. 394; s. c. 2 Cent. L. J. 508.

An order drawn upon an agent not in possession of the fund out of which it is to be satisfied, and accepted by him, fixes the fund irrevocably, and amounts to an equitable assignment. Nothing vests in the assignee of a bankrupt but the real and personal estate of which the bankrupt had the equitable as well as legal interest. The moment the money comes into the hands of the agent, he is bound to pay it over to the holder of the accepted order, although bankruptcy of the drawer has occurred between the acceptance and the receipt of the money. *McMenomy v. Ferrers*, 3 Johns. 71.

The filing of a petition in bankruptcy is an attempt to sell within the meaning of a clause giving the mortgagee the right to take possession in case of an attempt to sell. *Moore v. Young*, 4 Biss. 128.

If a deed is dated prior to the commencement of proceedings in bankruptcy, the bare fact that the acknowledgment is dated after that time is not sufficient to defeat the grantee's title. The deed vested the legal title in the grantee at the time of its delivery. In the absence of proof to the contrary, the presumption of law is that it was delivered on the day of its date, and the subsequent date of the certificate of acknowledgment can not overcome this presumption. *Hardin v. Osborne*, 60 Ill. 93.

A deed of the bankrupt without any certificate of acknowledgment is good against the assignee, for he is a grantee with full notice, and takes no greater interest or right than the bankrupt had. *In re Kansas City Manuf. Co.*, 9 B. R. 76.

The doctrine that ratification relates back to the inception of the transactions and renders the ratified act the same as if it had been originally authorized by the principal, is a fiction of the law, for the act of one can not be made the act of another; but by relation the law gives to the act of one the effect of an act of another. The law, however, will not feign a fiction to do a wrong, to make valid an invalid act, or to defeat the rights of others. Hence this doctrine can not be extended to the prejudice of strangers to the transaction. The act of ratification, in order to have a retroactive effect, must take place at a time and under circumstances when the ratifying party may himself lawfully do the act which he ratifies. The validity of an unauthorized deed of a corporation must be determined according to the circumstances which exist at the time when it is ratified. *Ibid.*

Where a party purchased from the bankrupt a part of certain bonds to which the latter was entitled upon complying with certain conditions, he obtained a right that may be enforced against the assignee if the conditions were performed, although the bonds were not separated from the others if they were all alike. *Hamilton v. National Loan Bank*, 3 Dillon, 230.

If the bankrupt proved and filed his claim in the probate court and then transferred it, the dividends should be paid to the assignee, and not to the transferee, irrespective of any question of fraud on the bankruptcy law. *Miller v. Parker*, 47 Ala. 312.

If a deed of trust to secure the payment of a note contains a power authorizing the creditor, his agent, attorney or assignee, to sell the property in default of payment of the note, the assignee of the creditor may sell under the power, and his deed will convey a legal estate. *Wood v. Boyd*, 28 Ark. 75.

A claim for compensation for the destruction of a vessel by a Confederate cruiser, equipped and sent out in England through the negligence of the British Government, is susceptible of a transfer that may be sustained in equity. *Williamson v. Colcord*, 13 B. R. 319.

A mere agreement to give what may be realized from a claim is a promissory arrangement, and does not constitute a complete and perfect gift. *Ibid.*

An agreement by a guardian to discharge one mortgage and take a new one, although he transcends his power in making it, is not absolutely void but is voidable only at the election of the infant on coming of age, and until so avoided, is valid as against the assignee of the mortgagor. *Burdick v. Jackson*, 15 B. R. 318; s. c. 14 N. Y. Supr. 488.

If the bankrupt, being the holder of a mortgage pledged to secure a loan, and then for a valuable consideration promised the mortgagor to redeem and cancel it, the assignee, if he redeems it, may enforce it. *McLean v. Cadwallader*, 15 B. R. 383; s. c. 34 Leg. Int. 140.

If an attorney institutes a suit under an agreement with the bankrupt for a certain portion of what may be recovered, he is entitled to that share although the recovery took place after the commencement of the proceedings in bankruptcy. *Maybin v. Raymond*, 15 B. R. 353; 4 A. L. T. (N. S.) 21.

Where goods are obtained through a misrepresentation by a firm composed of three members, a return of the goods or their proceeds to the creditor will be valid as against the assignee of two of the partners, if they have not lost their identity so as to form a part of the property of the bankrupts. *Montgomery v. Bucyrus Machine Co.*, 14 B. R. 193; s. c. 92 U. S. 257.

The creditor who holds collaterals as securities need not sell them at public auction, but may sell them at the stock exchange or brokers' board. *Sparhawk v. Drexel*, 12 B. R. 450.

Where an insolvent debtor acquiesces in a sale of securities, the assignee is bound by his acquiescence, although the securities are sacrificed. *Ibid.*

A creditor who is vested with the power to sell securities holds it in trust for the debtor's benefit as well as his own, and can not sacrifice the securities. *Ibid.*

A voluntary agreement between certain persons to which the debtor is in no wise a party, to make a contribution to him, does not create an indebtedness to him. *In re Oregon B. Printing Co.*, 13 B. R. 503; s. c. 11 Pac. L. R. 233; s. c. 3 Cent. L. J. 515.

An order passed in proceedings supplemental to an execution restraining a bank from paying money to the bankrupt is no defense to any action brought by an assignee subsequently appointed in proceedings instituted before that time. *Morris v. First Nat'l Bank*, 15 B. R. 281.

**Title Subject to Equities.**—The assignee takes the property of the bankrupt, subject to all legal and equitable claims of others. He is affected by all the equities which can be urged against the bankrupt. *Cook v. Tullis*, 9 B. R. 433; s. c. 18 Wall. 332; *Kelly v. Scott*, 49 N. Y. 595; *Parker v. Muggridge*, 2 Story, 334; *Fletcher v. Morey*, 2 Story, 555; *Mitchell v. Winslow*, 2 Story, 630; *Winsor v. McLellan*, 2 Story, 492; *Talcott v. Dudley*, 5 Ill. 427.

If the bank is estopped, his assignee is also estopped. *Kelly v. Scott*, 49

N. Y. 595; *Rockford, Rock Island & St. Louis R. R. Co. v. McKay & Aldus*, 3 B. R. 50; s. c. *Lowell*, 345; s. c. 1 L. T. B. 133.

When the bankrupt has contracted to manufacture an engine, and on the representation that it had been finished and delivered to a company for transportation to the purchaser, has obtained payment therefor, but the engine in fact was not finished or delivered for transportation, remaining in the possession of the bankrupt, and being designated as belonging to the purchaser, it belongs to the purchaser, and not to the assignee. The bankrupt and the assignee are estopped to say that the engine was not set apart, or that it was not in esse when the representations were made. *Rockford, Rock Island & St. Louis R. R. Co. v. McKay & Aldus*, 3 B. R. 50; s. c. *Lowell*, 345; s. c. 1 L. T. B. 133.

If the resolution of the directors of the bankrupt corporation approving of a deed of trust previously executed by its officers, and purporting to be passed by a proper quorum, was shown to the creditor before he discounted the note thus secured, the assignee is estopped from proving that it is untrue, and that a quorum was not present. *In re Kansas City Manuf. Co.*, 9 B. R. 76.

An agreement to sign a bond to a person to indemnify him for his liability in becoming surety for the bankrupt confers a right to an assignment which may be enforced in a court of equity and binds the assignee. *Tucker v. Daly*, 7 Gratt. 330.

If a bill of sale is recorded in the clerk's office at one place, upon a representation by the bankrupt that he resided there, it will bind the assignee although the bankrupt actually resided in another place. *Allen v. Whittemore*, 14 B. R. 189.

**Rights under Statutes.**—The assignee has no larger interests in regard to usurious contracts than the bankrupt had, although they are void in law. *Tiffany v. Boatman's Sav. Inst.*, 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 *Dillon*, 14; s. c. 18 *Wall*. 376.

The assignee has no power to institute proceedings for the recovery of a statutory forfeiture claimed by the bankrupt, either prior or subsequent to proceedings against him in bankruptcy. The power to institute proceedings for a forfeiture under the laws of Wisconsin against usury, is a privilege conferred upon the borrower alone, and the assignee is not the borrower in the sense of the law, but a purchaser. *Bromley v. Smith*, 5 B. R. 152; s. c. 2 *Biss*. 511.

Section 5198 only forfeits the interest for usury, but does not affect the principal. *First Nat'l. Bank of Mount Joy v. Wilson*, 72 *Penn.* 13.

Mere accommodation paper can have no effective or legal existence until it is transferred to a bona fide holder. The discounting of such paper at a higher rate of interest than the law allows is usurious, and not defensible as a purchase of the paper. *Tiffany v. Boatman's Sav. Inst.*, 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 *Dillon*, 14; s. c. 18 *Wall*. 376.

If a party purchase a negotiable note at a discount greater than the legal rate of interest from a broker in the usual course of business, and without any notice that the broker is acting for the maker, the assignee

of the maker can not recover the excess above the legal rate of interest as usury. *Sparhawk v. Cochran*, 30 Leg. Int. 232.

Where the right to recover usurious interest is a redress for a personal wrong, it does not pass to the assignee. *Nichols v. Bellows*, 22 Vt. 581.

Where the statute gives to the party paying usurious interest the right to recover it back, that right passes to the assignee. *Moore v. Jones*, 23 Vt. 739; *Wheelock v. Lee*, 10 B. R. 363; s. c. 64 N. Y. 242.

The assignee has all the rights and powers which are given to the whole body of creditors, or to the whole of any one class of creditors whether at law or in equity. *Wilkins v. Davis*, 15 B. R. 60.

An assignee of a general partner may maintain an action to recover a division of profits made to a special partner in reduction of the capital. *Ibid.*

The assignee of a bankrupt corporation can not maintain an action to enforce the collateral liability of the stockholders for the debts of the corporation. *Dutcher v. Marine Nat'l. Bank*, 11 B. R. 457; s. c. 12 Blatch. 435.

An assignee can not under the laws of New York recover money paid by an insolvent bank in the usual and ordinary course of its business to a creditor who was ignorant of its insolvency. *Dutcher v. Importers' & Traders' Nat. Bank*, 59 N. Y. 5; s. c. 1 N. Y. Supr. 400.

**The Property of the Bankrupt's Wife and Children.**—Marriage is a qualified gift to the husband of the wife's choses in action, upon condition that he reduces them to possession during its continuance. The assignment in bankruptcy vests in the assignee all the rights of the husband of the choses in action of the wife, and, as a consequence, the assignee may do all that the husband could do prior to the assignment, and this embraces the right to sue for, recover and receive them. It makes no difference in regard to the rights of the assignee, whether the choses in action have or have not been placed upon the schedules by the bankrupt. *In re Boyd*, 5 B. R. 190; *Butler v. Merchants' Ins. Co.*, 8 Ala. 146.

The husband's interest in his wife's choses in action is not ownership but power, and does not pass to his assignee. If they have not been reduced to possession by him at the time of the bankruptcy, they do not pass to the assignee. *Wickham v. Valle*, 11 B. R. 83.

If the distributive share of the bankrupt's wife in her father's estate remains in the hands of the administrator or executor at the time of the commencement of the proceedings in bankruptcy, it does not pass to the assignee. *Shaw v. Mitchell*, 2 Ware, 220; *Shay v. Sessaman*, 10 Penn. 432; *Wickham v. Valle*, 11 B. R. 83.

The wife's distributive share will not vest in the assignee, although the husband is administrator, for he holds the property in his representative and not in his personal character. *Shaw v. Mitchell*, 2 Ware, 220.

A conveyance by the bankrupt to his wife of his interest in her choses in action is inoperative and void, and they pass to the assignee. *Butler v. Merchants' Ins. Co.*, 8 Ala. 146.

If the bankrupt's wife has no other means of support, she may be allowed a portion of the income derived from real estate owned by her. *In re Ernst Brandt*, 5 Biss. 217.

If the husband at the time of joining with his wife in a mortgage on her real estate, received a sum of money equal to the value of his estate by courtesy, the assignee will not be entitled to any part of the residue on a sale under the mortgage. *Shippen's Appeal*, 15 B. R. 553.

If the wife, without the knowledge of her husband, takes a note payable to her husband or bearer for a debt due to her before marriage, and the husband asserts no title to it or authority over it, but allows her to keep possession of it and collect the interest, she is entitled to it as against the assignee. *In re George W. Snow*, 1 N. Y. Leg. Obs. 264; s. c. 5 Law Rep. 369.

A possibility which is held under a will by the bankrupt's wife, and made dependent upon her surviving another legatee, does not pass to the assignee. *Krumbaar v. Burt*, 2 Wash. C. C. 406.

Articles of jewelry given to the wife previous to marriage, and continuing in her use since, do not pass to the assignee. *In re Edward H. Ludlow*, 1 N. Y. Leg. Obs. 322; *in re Chester S. Kasson*, 4 Law Rep. 489.

Gifts from the husband to the wife of personal ornaments or attire, compatible in value and character with his circumstances at the time, are her sole property as paraphernalia, and do not pass to the assignee. *In re Edward H. Ludlow*, 1 N. Y. Leg. Obs. 322; *in re Chester S. Kasson*, 4 Law Rep. 489. *Contra*, *in re Benjamin B. Grant*, 2 Story, 312.

Mourning rings given to the bankrupt's wife since her marriage are from their very nature and character purely personal and for her sole and separate use, and do not pass to the assignee. *In re Benjamin B. Grant*, 2 Story, 312.

The legal title to an insurance policy on the life of the bankrupt for the benefit of his wife, belongs to the wife, and, if he is solvent when the premiums are paid, the policy can not be assigned by him. *In re Bear & Steinberg*, 11 B. R. 46; s. c. 1 Cent. L. J. 607.

If the husband pays premiums on a policy upon his life for the benefit of his wife after he becomes insolvent, the assignee may recover from the wife the amount so advanced, with interest, to be taken out of the policy when that shall be paid. *Ibid*.

Gifts made by a bankrupt to his children which were proper and suitable to him in his circumstances and condition, may be retained by them. *In re Benjamin B. Grant*, 2 Story, 312.

The children of the bankrupt may retain watches given to them by persons other than their parents. *Ibid*.

If the bankrupt, when insolvent, paid only part of the money to purchase a watch for his child, the assignee is only entitled to the amount so paid. *Ibid*.

Where the bankrupt has, in good faith, made an agreement with his minor children that they shall have a certain share of their earnings, and such share has always been kept by them in their own name, separate

from his property, the share will not pass to the assignee. *Tebbets v. Torr*, 5 Law Rep. 503.

Gifts made by the bankrupt to his children which were not suitable and appropriate to his circumstances are fraudulent, and pass to the assignee. *In re Benjamin B. Grant*, 2 Story, 312.

**Rights in Representative Character.**—An adjudication of bankruptcy is in the nature of a statute execution for all the creditors. *In re Elam Rust*, 1 N. Y. Leg. Obs. 326.

Proceedings in bankruptcy are in the nature of an equitable attachment as against the equitable estate of the bankrupt, and the assignee, as the representative of all the creditors of the bankrupt, thereby becomes the owner of such equitable interest, with an equity superior even to a judgment creditor who has an execution returned unsatisfied, but who had not obtained an equitable lien by filing a creditor's bill or taking other proceedings to reach such equitable estate before the filing of the petition in bankruptcy. *In re Hinds et al.*, 3 B. R. 351.

The assignee represents the creditors, and for their benefit the ratification of an unauthorized deed will not be permitted to relate back to the time of its execution, so as to bind him, where it would be void under the bankruptcy law if executed at the time of the ratification. *In re Kansas City Manuf. Co.*, 9 B. R. 76.

The assignee in bankruptcy more nearly resembles a purchaser of the bankrupt's property at an executor's sale than any other familiar character to which he may be likened. He acquires the rights of the debtor in the property, and also the rights of creditors to impeach any prior fraudulent conveyance, but takes subject to all equities against the debtor in the property purchased. A fund paid into a State court upon a judgment rendered in favor of the bankrupt is subject to be applied according to its usual practice. The clerk may retain the costs due his office out of the fund, and pay the residue to the assignee. *Clerk's Office v. Bank*, 66 N. C. 214.

The assignee succeeds to the rights of the creditors as well as to those of the bankrupt, and may contest the validity of a conveyance, even though the bankrupt could not. He may institute a suit to recover property conveyed in fraud of creditors, as well as to recover property, or its value, which, by sections 5128 or 5021 has been transferred in fraud of the bankruptcy act. *In re Metzger*, 2 B. R. 355; *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *Bradshaw v. Klein*, 1 B. R. 542; s. c. 2 Bliss, 20; s. c. 1 L. T. B. 72; *Buckingham v. McLean*, 3 McLean, 185; s. c. 13 How, 151.

The proceedings in bankruptcy arrest the ordinary proceedings of creditors to obtain judgments, and thereby to secure an appropriation of the debtor's property to their use, and the assignee represents them. He is trustee for them, and whatever right they might assert as creditors if they had obtained judgments, he may assert for their benefit, whether it be to set aside conveyances which are fraudulent and void as against creditors, or which are otherwise as against them invalid. *In re Simeon Leland et al.*, 10 Blatch, 503.



Transactions by or with debtors which are void as to creditors, whether for fraud, want of completeness in any of their incidents, or for any cause whatever, are equally void as against the assignee. *Kane v. Rice*, 10 B. R. 469.

The assignee is not bound by any lien or incumbrance which is not valid against creditors. *In re Tills & May*, 11 B. R. 214.

The assignee occupies the position of a judgment creditor to all intents and purposes, so far as he represents creditors, and whenever such creditor can enforce rights which the debtor could not, the assignee can also enforce them. *Kane v. Rice*, 10 B. R. 469; *Miller v. Jones*, 15 B. R. 150.

Any defense that would not be good as against creditors in an equitable suit, can not be maintained against the assignee. His position is analogous to that of a receiver appointed by a court of chancery. A resolution releasing stockholders from their liability is not good as against him when it is not valid as against creditors. *Upton v. Hansbrough*, 10 B. R. 369; s. c. 3 Biss. 417.

The assignee of a bankrupt corporation may recover money or property obtained from the corporation under a void contract, and will not be affected by the illegal acts of the corporation or its officers. *In re Jaycox & Green*, 7 B. R. 578; s. c. 13 B. R. 122; s. c. 12 Blatch. 209; s. c. 13 Blatch. 70.

The assignee may impeach a transaction between a bankrupt corporation and its stockholders, which creditors could impeach. *Sawyer v. Hoag*, 9 B. R. 145; s. c. 3 Biss. 293; s. c. 17 Wall. 610.

The capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. The assignee has a right to inquire into a conventional payment of his stock by one of the shareholders of the company. If the payment is merely conventional through the exchange of checks, thus changing the character of the debt from one of a stock subscription unpaid to that of a loan of money, it is void. It would be just the same if agreeing beforehand to turn the stock debt into a loan, the shareholder should bring the money with him, pay it, take a receipt for it, and carry it away with him. This would be precisely the equivalent of the exchange of checks between the parties. It is the intent and purpose of the transaction which forbids it to be treated as a valid payment. *Ibid.*

A judgment confessed upon an insufficient verification is valid against all except judgment creditors, who may institute proceeding to set it aside. The assignee is not a judgment creditor, and the bankruptcy act nowhere confers upon him the rights of such creditors. *Cook v. Whipple*, 9 B. R. 155; s. c. 55 N. Y. 150.

Although the property at the time of the commencement of proceedings in bankruptcy is held by one who claims it by transfer, still, if it be shown that such transfer is void, it follows that the bankrupt did own such property at the time when bankruptcy proceedings were commenced, and, therefore, the title to such property vests in the assignee under

the deed of assignment. *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *in re Hussmann*, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 C. L. N. 177; *Shackleford v. Collier*, 6 Bush, 149.

If a party refuses to take less than the full amount of his demand, and on receiving that signs a composition article, the assignee may recover the money, although the composition failed because it was not signed by all the creditors, according to the requirement of its terms. *Bean v. Brookmire*, 7 B. R. 568; s. c. 2 Dillon, 108; s. c. 6 L. T. B. 114; s. c. 3 C. L. N. 314; *Amsinck v. Bean*, 8 B. R. 228; s. c. 11 B. R. 495; s. c. 10 Blatch. 361; s. c. 22 Wall. 395.

An assignee does not represent creditors so as to be able to prosecute their claims against a trustee of a corporation who has rendered himself liable to them for filing a false report. *Bristol v. Sandford*, 13 B. R. 78; s. c. 12 Blatch. 341.

Although a composition is not by its terms to be valid unless signed by all the creditors, yet, if the signature of a party misleads and injures other creditors, he is estopped as against them to deny its validity, even though it is not signed by all. *Bean v. Brookmire*, 7 B. R. 568; s. c. 2 Dillon, 108; s. c. 6 L. T. B. 114; s. c. 3 C. L. N. 314; *Amsinck v. Bean*, 8 B. R. 228; s. c. 11 B. R. 495; s. c. 10 Blatch. 361; s. c. 22 Wall. 395.

If the compromise agreement stipulates for the payment of seventy per cent. in six, twelve, and eighteen months, a secret agreement whereby a creditor accepts fifty per cent. in cash in full of his claim, is a fraud on the agreement. *Amsinck v. Bean*, 8 B. R. 228; s. c. 11 B. R. 495; s. c. 10 Blatch. 361; s. c. 22 Wall. 395.

If one partner receives all the assets of the firm, and executes a compromise agreement with the firm creditors, his assignee may recover money given to a creditor in fraud of such agreement, although the firm is not declared bankrupt. *Ibid.*

It is now held to be the better policy to allow the debtor, though a participant in the fraud, to recover the amount paid to a creditor who refuses to join in a composition agreement, unless he can obtain a preference, and having obtained it, pretends to come into the composition with other creditors on equal terms. The right to recover such bonus passes to the assignee. *Bean v. Brookmire*, 1 Dillon, 151.

**Unrecorded Deeds.**— If a mortgage has never been delivered, the property passes to the assignee free from the incumbrance, although the mortgage was made prior to the commencement of the proceedings in bankruptcy. *Jewett v. Preston*, 27 Me. 400.

When the statutes of a State expressly declare that a deed shall be void as to creditors until and except from the time it is duly admitted to record, the title of the assignee will prevail against any claim under a deed, if it remained unrecorded when the petition in bankruptcy was filed. It is not an unreasonable construction of the bankruptcy act which regards it as vesting in the assignee, for the benefit of creditors in general, the estate of the bankrupt discharged of liens or trusts, which, at the time of the filing of the petition, are valid only inter partes under the statute of the State in which they are claimed to exist. *In re Wynne*,

4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116; Brock v. Terrell, 2 B. R. 643; Allen v. Massey, 4 B. R. 248; s. c. 7 B. R. 401; s. c. 2 Abb. C. C. 60; s. c. 1 Dillon, 40; s. c. 17 Wall. 351; s. c. 1 L. T. B. 218; National Bank v. Hunt, 4 B. R. 616; s. c. 11 Wall. 391; Harvey v. Crane, 5 B. R. 218; s. c. 2 Biss. 496; Edmondson v. Hyde, 7 B. R. 1; s. c. 2 Saw. 205; s. c. 5 L. T. B. 380; in re Perrin & Hance, 7 B. R. 283; Moore v. Young, 4 Biss. 128; Barker v. Smith, 12 B. R. 474; s. c. 2 Woods, 87; in re Thomas C. Gurney, 15 B. R. 373; s. c. 9 C. L. N. 255. Contra, in re Charles Collins, 12 B. R. 379; s. c. 12 Blatch. 548; National Bank v. Conway, 14 B. R. 175, 513; Winsor v. McLellan, 2 Story, 492; in re Griffiths, 3 B. R. 731; s. c. Lowell, 431; Coggeshall v. Potter, 4 B. R. 73; s. c. 6 B. R. 10; s. c. 1 Holmes, 75; Sawyer v. Turpin, 5 B. R. 339; s. c. 13 B. R. 271; s. c. 91 U. S. 114; s. c. 1 Holmes, 251.

If the State statute deprives the mortgage of effect until it is deposited with the proper officer, as to creditors, subsequent purchasers, and mortgagees in good faith, it will be valid against the assignee if it is deposited for record prior to the commencement of proceedings in bankruptcy, for the assignee does not belong to either of the classes protected by the statute. Gibson v. Warden, 14 Wall. 244.

Where a chattel mortgage takes effect as against third persons as well as between the parties from the time of its execution, although it is not recorded or accompanied by possession, unless intervening rights have been obtained, it will be valid against the assignee if it is recorded before the commencement of the proceedings in bankruptcy. Sawyer v. Turpin, 5 B. R. 339; s. c. 13 B. R. 271; s. c. 91 U. S. 114; s. c. 1 Holmes, 251.

If a deed of trust is actually delivered to a trustee with power to record it when he deems proper, it is valid as against the assignee, although it is not recorded until after the grantor's failure. National Bank v. Conway, 14 B. R. 175, 513.

Although a mortgage be regarded as having no validity whatever until it is filed, as against creditors of the mortgagor, yet it will be valid if it is filed before the filing of the petition in bankruptcy, for the title of the assignee relates back only to the filing of the petition. In re Perrin & Hance, 7 B. R. 283.

If a mortgage, although it is not recorded in time, is valid as against general creditors and there are only general creditors at the time of the filing, it will be valid as against the assignee. Johnson v. Patterson, 2 Woods, 443.

If judgment creditors have levied upon the property covered by a chattel mortgage, which is void under the recording laws of the State, the assignee may maintain an action to set it aside. Platt v. Stewart, 13 Blatch. 481.

Under the laws of Illinois, a mortgagee who takes possession of the property before any other person has acquired any lien or vested rights therein, has a better title than the assignee, although the mortgage was not properly acknowledged. In re Burnett, 6 C. L. N. 366.

Where the statute declares that a mortgage of chattels shall be void, if the mortgagor remain in possession, unless the mortgage is filed in

the record office of the place where the mortgagor resides, the mortgage will be void as against the assignee for want of filing, although it was given to secure a note payable one day after date. *In re Simeon Leland*, 10 Blatch. 503.

Under the laws of Iowa, the assignee in assailing a mortgage which was recorded at the time of the commencement of proceedings in bankruptcy, must show something more than that debts were created without notice of it before it was recorded. *Cragin v. Carmichael*, 11 B. R. 511; s. c. 2 Dillon, 519.

By the laws of Michigan, a mortgage of chattels is absolutely void as against the creditors of the mortgagor unless it is filed in the clerk's office in the township where the mortgagor resides. If the mortgage is given by more than one, and the mortgagors reside in different townships, it will be void, although it is filed in the clerk's office in the township where one of them resides and where the property is located. *Kane v. Rice*, 10 B. R. 469.

If a mortgage of chattels is void on account of the omission to record it, the mortgagee does not obtain a right to them by taking possession before the commencement of proceedings in bankruptcy. *Harvey v. Crane*, 5 B. R. 218; s. c. 2 Biss. 496; *Kane v. Rice*, 10 B. R. 469. *Contra*, *Miller v. Jones*, 15 B. R. 150.

The assignee in attacking a conveyance as invalid under the laws of the State has precisely the rights which an attaching or judgment creditor would have, and no more. *Cragin v. Carmichael*, 11 B. R. 511; s. c. 2 Dillon, 519; *Miller v. Jones*, 15 B. R. 150.

**Rejection by Assignee.**—As a general rule, contracts to be performed to a party and his rights of action are deemed property, and such contracts and rights of action pass by the operation of the bankruptcy law to the assignee. But to this general rule there are many exceptions, some from the nature of the contracts, and some from the nature of the interests involved. *Streeter v. Sumner*, 31 N. H. 542.

The assignee has an election to repudiate a contract, if it may more properly be regarded as a burden than a privilege, as for instance, where from the conditions of the contract, he can derive no benefit for the creditors, and may subject the estate to loss if he assumes the contract. Such a contract is not property within the meaning of the law. *Streeter v. Sumner*, 31 N. H. 542; *Oakey v. Gardner*, 2 La. An. 1005; *Rugeley v. Robinson*, 19 Ala. 404.

The assignee is not at least ordinarily bound to take into his possession property which will be a burden instead of a benefit to the estate. If he elects not to take, the property remains in the bankrupt, and no one has a right to dispute his possession. His possessory title is good against all the world but his assignee. *Smith v. Gordon*, 2 N. Y. Leg. Obs. 325; s. c. 6 Law Rep. 313.

If the assignee may elect to take or not to take any part of the bankrupt's property, some period of time must be limited, within which the election is to be made, for he can not be allowed to hold the title in abeyance for an indefinite period. If, with the knowledge of the bankrupt's

title or with means of knowledge, he stands by for a length of time without asserting his claim, and allows third persons to acquire an interest in the property, it is too late to assert his claim, and the time for an election is past. *Ibid.*

The right of the assignee to reject property is confined to those cases where he would be charged with a burden or liability if the property passed to him. *Berry v. Gillis*, 17 N. H. 9.

The neglect of the assignee to impeach a fraudulent conveyance does not enable a creditor to pursue it and appropriate it to the payment of his debt. *King v. Dietz*, 12 Penn. 156.

The assignee of an individual partner may relinquish all right to a judgment rendered in favor of the firm if the firm is insolvent. *Oakey v. Gardner*, 2 La. An. 1005.

The taking of the title to a debt or claim does not charge the assignee with a liability to the party from whom it appears to be due. He can not, therefore, reject it. The debtor is entitled to know to whom he is indebted, and it should not be left to the election of the assignee to determine whether he shall be a debtor to the bankrupt or a debtor to the assignee. *Berry v. Gillis*, 17 N. H. 9; *Deadrick v. Armour*, 10 Humph. 588.

The assignee may elect to abandon a contract which stipulates for the personal services of the bankrupt. *Streeter v. Sumner*, 31 N. H. 542.

If the assignee of a lease under seal continues to occupy the premises after the commencement of the proceedings in bankruptcy, without any arrangement with the assignee in bankruptcy, he holds under the landlord as a tenant at will, and is liable in assumpsit and not in covenant upon the lease. *Ryerss v. Farwell*, 6 Barb. 615.

**Effect of Surrender to the Assignee.**—When the defendant in an action of replevin, after the commencement of the suit, delivers the property in controversy to the assignee of the party from whom the plaintiff obtained it, by transfer which is void under the bankruptcy law, he may set up such delivery as a defense to the action of replevin. *Bolander v. Gentry*, 36 Cal. 105.

A sheriff who is sued for the conversion of certain property, seized by him under an attachment, which is claimed by the plaintiff under a mortgage, may show that before the commencement of the action he delivered the property to the assignee of the mortgagor, and that the mortgage is void under the bankruptcy law as a fraudulent preference. It is a familiar principle, that the defendant in an action of trover may always show in mitigation of damages, especially when the taking or conversion was not willful, that the property has gone from his possession, by process of law or otherwise, to the plaintiff, or to his use, or to a party who, as against the plaintiff, had the better title to it. The United States courts have exclusive jurisdiction of proceedings in bankruptcy, but all questions of title to property derived through such proceedings are within the jurisdiction of the State courts. The question presented by such defense is not a question of jurisdiction but of title. *Hanson v. Herrick*, 100 Mass. 323; *Perry v. Chandler*, 56 Mass. 237. *Contra*, *Bromley v. Goodrich*, 15 B. R. 289; s. c. 40 Wis. 131.

If the action was instituted before the commencement of the proceedings in bankruptcy, the proof will prevent the recovery of more than nominal damages. *Perry v. Chandler*, 56 Mass. 237.

If the sale is good at common law, the purchaser can recover in an action against the sheriff for a levy on the property. If it is a fraud on the bankruptcy act, the assignee can recover to a like extent against the purchaser. The pendency of such an action is no defense to the action against the sheriff. *Hathaway v. Brown*, 18 Minn. 414.

In an action by a preferred creditor to recover the value of property taken by the sheriff, under an attachment against the debtor, the defendant can not plead a surrender of the goods to the assignee as a bar to the action. *Stanley v. Sutherland*, 16 A. L. Reg. 298.

A sheriff who is sued for the value of property taken by him under an attachment can not prove that the transfer to the plaintiff was made by the debtor in violation of the bankruptcy law. *Ibid*.

**Dissolution of Attachments.**—(c) "Mesne process" is all process issued in a suit before execution. *Pennington v. Lowenstein*, 1 B. R. 570; *Corner v. Mallory*, 31 Md. 478.

The term "attachment on mesne process" embraces any process by which a lien is first acquired. *Morgan v. Campbell*, 11 B. R. 529; s. c. 22 Wall. 381.

An attachment under the C. C. P. of North Carolina is prior to final judgment, and is, therefore, in its nature mesne process. *Mixer v. Excelsior Co.*, 65 N. C. 552.

An attachment on mesne process is a statute lien. *Peck v. Jenness*, 7 How. 612; *Downer v. Brackett*, 2 Vt. 599; s. c. 5 Law Rep. 392; *Haughton v. Eustis*, 5 Law Rep. 505; *Ingraham v. Phillips*, 1 Day, 117; *Kittredge v. Emerson*, 15 N. H. 227; *Wells v. Brander*, 18 Miss. 348; *Shaffer v. McMaken*, 1 Ind. 274; *Kittredge v. Warren*, 14 N. H. 509; *Davenport v. Tilton*, 51 Mass. 320. Contra, in re *John S. Foster*, 2 Story, 131; *Everett v. Stone*, 3 Story, 446; in re *Bellows & Peck*, 3 Story, 428.

Congress has the power, by the operation of a general bankruptcy law, to divest the conditional lien acquired by the levy of an attachment. *Corner v. Miller*, 1 B. R. 403; in re *Ellis*, 1 B. R. 551; in re *David B. Williams*, 2 B. R. 229; s. c. 1 L. T. B. 107, 113; s. c. 3 A. L. Rev. 374; in re *Brand*, 3 B. R. 324; s. c. 2 L. T. B. 66; *Mixer v. Excelsior Co.*, 65 N. C. 552; *Payson v. Payson*, 1 Mass. 283; *Flagg v. Tyler*, 6 Mass. 33; *Harrison v. Sterry*, 5 Cranch. 289; s. c. Bee, 244; *Hatch v. Seely*, 13 B. R. 380; s. c. 37 Iowa, 493.

The provision applies to attachments sued out in State courts. *Bank v. Overstreet*, 13 B. R. 154; s. c. 10 Bush, 118.

The language of this clause is broad and comprehensive, and not restricted, and made to have reference to the time at which the act was to become operative. The period of four months was not intended to have reference to the 1st day of June, 1867, when the act was to go into effect as to all its provisions, but was fixed as a period within which no preference should be gained by one creditor, by attachment, over the claims of other creditors of the bankrupt. An attachment made after

the passage of the act, but before the 1st day of June, 1867, and within a period of four months next preceding the commencement of proceedings in bankruptcy, was dissolved. *Corner v. Mallory*, 31 Md. 478.

The appointment of a receiver and the transfer of the custody of the attached property from the sheriff to him alters no one's rights. His custody is that of the law, and is in its nature provisional and suspensive, leaving the rights of the parties concerned to be controlled by the ultimate judgment of the court. *Miller v. Bowles*, 9 B. R. 354; s. c. 10 B. R. 515; s. c. 2 N. Y. Supr. 568; s. c. 58 N. Y. 253.

The commencement of proceedings in bankruptcy against one partner within four months after the issuing of an attachment against a firm does not dissolve it. *Mason v. Warthens*, 14 B. R. 341; s. c. 7 W. Va. 532.

A resolution of composition which is passed without calling the first meeting of creditors and electing an assignee, does not dissolve an attachment issued within four months before the commencement of such proceedings. In *re W. D. Clapp & Co.*, 14 B. R. 191; in *re Shields*, 15 B. R. 532; s. c. 4 Cent. L. J. 557; s. c. 24 Pitts. L. J. 190. *Contra*, *Miller v. Mackenzie*, 13 B. R. 496; s. c. 43 Md. 404; *Smith v. Engle*, 14 B. R. 481; s. c. 9 C. L. N. 46.

An attachment is not a fraud on the bankruptcy law, and rights which have accrued thereby under the State law other than expenses are not affected by proceedings in bankruptcy. *Whitted v. Pillsbury*, 13 B. R. 241.

This section only refers to attachments which are pending at the time the petition in bankruptcy is filed. If the attachment is prosecuted to judgment prior to that time, the judgment can not be examined or impeached in a collateral action. *Henkleman v. Smith*, 12 B. R. 121; s. c. 41 Md. 164; in *re Enoch Cook*, 2 Story, 376; *Fiske v. Hunt*, 2 Story, 582.

When an execution is not in fact levied upon a fund in the hands of the garnishee, neither the judgment nor execution create any lien upon the fund other than that under which it has been previously held. The mere fact that a judgment has been rendered and an execution issued, but not levied, does not have the effect to convert the attachment lien upon a fund in the hands of a garnishee into a lien upon final process. In such a case the attachment lien remains, after the judgment and before the levy of the execution, precisely what it was before, to-wit, an attachment under mesne process. *Hove v. Union Ins. Co.*, 42 Cal. 528; s. c. 4 L. T. B. 41.

An attachment made March 8, 1867, at seven o'clock in the afternoon, was dissolved by the commencement of proceedings in bankruptcy on July 8, 1867, at two o'clock and fifteen minutes in the afternoon, for it was made within the period of four months prior to such commencement. Fractions of a day will be considered and the very hour ascertained where the means for an accurate computation are afforded. *Westbrook Manuf. Co. v. Grant*, 60 Me. 88; s. c. 6 L. T. B. 545.

If a lien is obtained by the filing of a bill to reach the equitable assets of the bankrupt, it will be preserved although an attachment was issued with the summons, for the attachment may be regarded as mere surplusage. *House v. Swanson*, 7 Tenn. 32.

If a mechanic issued an attachment within the time required by law, he retains his lien although the attachment is dissolved. *Loudon v. Blanford*, 56 Ga. 150.

A judgment obtained in the courts of one State, can not be collected in another State, except by a suit thereon at common law, or by process of attachment; and in either case, the writ issued in the suit to collect it is mesne process. An attachment on such judgment will be dissolved, if issued within four months before the commencement of proceedings in bankruptcy. *Randall & Co. v. McLain*, 40 Ga. 162.

An attachment properly issued is legal and valid until dissolved. It is not vacated or made void ab initio by the commencement of proceedings in bankruptcy, but simply dissolved. All proceedings under it up to that time are regular and valid. In *re Housberger et al.*, 2 B. R. 92; s. c. 2 Ben. 504; in *re C. H. Preston*, 6 B. R. 545.

A bankrupt can not plead the pendency of the proceedings in bankruptcy in abatement of the attachment. *Sims v. Jacobson*, 51 Ala. 186.

The bankrupt can not claim the dissolution of the attachment for the lien continues as to him. *Ibid.*

A trustee in bankruptcy is entitled to all the assets seized on attachment on mesne process issued from a State court within four months before the commencement of the proceedings in bankruptcy, and the State court, on the petition of the trustee, will order that they be delivered to him. *Ballin v. Ferst*, 55 Ga. 546.

The assignee can not be made a party plaintiff in an attachment suit pending against the bankrupt. The assignee is the representative of the bankrupt's estate, but he is not the representative of the plaintiff in an attachment. *Smith v. Lawton*, 39 Ga. 29.

The assignee may, on his own motion, be made a party, if for no other reason than to have it properly made known to the court that the defendant has become a bankrupt. He has also a right to move to dismiss the attachment. The adjudication of bankruptcy must be made known to the State court in some authentic mode. It may be denied. Order is one of the first requisites of legal proceedings, and the State court can not take notice of the judgments of other courts by instruction. They must be brought to the notice of the court, and this can not be done without parties. *Kent v. Downing*, 10 B. R. 538; s. c. 44 Ga. 116; *Johnson v. Bishop*, 8 B. R. 533; s. c. 1 Wool. 324; *Harrod v. Burgess*, 5 Rob. (La.) 449.

Where the attachment was issued within four months before the commencement of the proceedings in bankruptcy, it will, on motion, be dissolved by the State court, although a judgment has been entered and the proceeds of a sale of the property under an execution paid over to the plaintiff by the sheriff. *Dickerson v. Spaulding*, 15 B. R. 313; s. c. 14 N. Y. Supr. 288.

An assignee may move for a dissolution of the attachment, although the property has been sold, and it is not proper to put him on terms in this respect. *King v. Lorton*, 14 B. R. 383; s. c. 53 Ga. 64.

When a motion for the dissolution of an attachment asks that the sheriff be directed to deliver the property to the assignee, notice thereof



must be given to the sheriff. *Dickerson v. Spaulding*, 15 B. R. 313; s. c. 14 N. Y. Supr. 288.

A claim by the assignee of the defendant that the attachment has been dissolved by the bankruptcy, presents substantive material facts to abate the proceedings, and those facts should be pleaded in an issuable shape and verified by the oath of the claimant instead of being set forth in a motion. *Hecht v. Wassell*, 27 Ark. 412.

A plea of the commencement of the proceedings in bankruptcy is insufficient, for the filing of the petition is but an incipient step in the proceeding for an adjudication. *Wells v. Brander*, 18 Miss. 348.

If the defendant files a petition in bankruptcy after the levying of an attachment, the proceedings should be stayed until an assignee is appointed. *Fisher v. Vose*, 3 Rob. (La.) 457; *Kittredge v. Emerson*, 15 N. H. 227.

The assignee has a right to appear in the State court, and on motion have the attachment dissolved. *Loudon v. King*, 50 Ga. 302.

An allegation that the attachment has been dissolved by the bankruptcy of the defendant, is matter in abatement, and should be properly pleaded and verified, instead of being set forth in a general vague motion. *Hecht v. Wassell*, 27 Ark. 412.

Where the garnishee files a petition in bankruptcy within four months after the service of the writ of garnishment upon him, the attachment is dissolved. *Janes v. Beach*, 1 Mich. N. P. 94.

No intervention by the assignee in the attachment suit is essential to the dissolution of a garnishment. When the bankruptcy of a garnishee occurs, the fund falls back into the estate, and is unaffected by a judgment between a bankrupt and a third person assuming to direct it. *Ibid.*

From the date of the dissolution of the attachment, the sheriff, or other person having then actual possession of the attached property, becomes divested of all official relations to that property, and becomes a simple bailee thereof to the use of the person by virtue of the bankruptcy act entitled to the same. If he afterward, by sale or in any other way, disposes of the property otherwise than to transfer the bankrupt's interest in the same to him, to whom by the bankruptcy law it falls, his act has no official character, and needs, to make it valid, the ratification of the person having title under the law. *In re C. H. Preston*, 6 B. R. 545.

An attaching creditor whose attachment has been dissolved by an order of the court, has no lien on the fund. *Loudon v. Blanford*, 56 Ga. 150.

The clerk has no right to his costs until the fund has been adjudged subject to costs on the termination of the suit. *Ballin v. Ferst*, 55 Ga. 546.

The attaching creditor can not prove the costs incurred in the attachment, because until judgment is obtained, they are not a debt of the bankrupt, for they were not incurred for his benefit or at his request. *In re Fortune*, 2 B. R. 662; s. c. *Lowell*, 306; *Gardner v. Cook*, 7 B. R. 346; *in re C. H. Preston*, 6 B. R. 545; *in re Hatje*, 12 B. R. 548; s. c. 6 Blss. 436.

The lien for the debt and for the costs is precisely the same in all respects, in regard to the means by which it is acquired, and the tenure by which it is held, and when such lien ceases by reason of the dissolution of the attachment as to one, it must necessarily cease as to the other. *In*

re Geo. S. Ward, 9 B. R. 349; in re C. H. Preston, 6 B. R. 545; in re Fortune, 2 B. R. 662; s. c. Lowell, 306. Contra, in re Housberger et al., 2 B. R. 92; s. c. 2 Ben. 504; in re C. H. Preston, 5 B. R. 293; Loudon v. King, 50 Ga. 302; in re John S. Foster, 2 Story, 131.

When the claim on which the attachment was issued is merged into a judgment rendered after the commencement of proceedings in bankruptcy, the lien for fees and expenses is lost and extinguished in the judgment. In re David B. Williams, 2 B. R. 229; s. c. 3 L. T. B. 107, 113; s. c. 3 A. L. Rev. 374.

The rights of the officer making the attachment are no greater than those of the attaching creditor. In case of the dissolution of the attachment, he has no lien whatever for his costs and disbursements. In such case he must look to the attaching creditor alone for the same, and in no case can he withhold the property from the marshal or assignee on account thereof, or look to the assignee or the bankrupt's estate for the payment thereof. In re Geo. S. Ward, 9 B. R. 349.

An officer must look to the party who employs him for his fees. He has no claim upon the adverse party for them. Zeiber v. Hill, 8 B. R. 239; s. c. 1 Saw. 268.

If the sheriff sells the property after the commencement of proceedings in bankruptcy, his lien is lost when he lets it go. Nothing less than the consent of the person entitled at the time of the sale to the property can preserve the lien to take effect on the proceeds. In re C. H. Preston, 6 B. R. 545.

The sheriff can not retain the property until the fees and charges are paid; for when the attachment, by virtue of which he holds the property, is dissolved, he has no means of enforcing his lien against the property. His remedy, if he has a lien, is to apply to the bankruptcy court to have it allowed and paid out of the assets that may come into the hands of the assignee. In re W. S. Stevens, 5 B. R. 298; s. c. 2 Biss. 373.

The costs are but an incident, and the debt or principal must be proven and allowed before the costs can be proven and allowed. In re C. H. Preston, 5 B. R. 293.

Costs which are made after the commencement of proceedings in bankruptcy can not be allowed. *Ibid.*

Costs incurred in attaching property which is not liable to attachment can not be allowed. *Ibid.*

The State court can not direct any of the fund to be paid to the attaching creditor, but the whole must be paid over to the assignee. Harmon v. Jameson, 1 Cranch C. C. 288.

When the attachment is dissolved, the State court may adjust the lien for costs before turning the money over to the assignee. Loudon v. King, 50 Ga. 302.

The bankruptcy court may, in the exercise of its equitable jurisdiction, require the assignee to pay such charges as appear to have benefited the estate in his hands, though incurred before the petition was filed, and not protected by an absolute lien. When the assignee receives the benefit of the costs of an attachment, he should sustain the burden. In re Fortune,

2 B. R. 662; s. c. *Lowell*, 306; *Gardner v. Cook*, 7 B. R. 346; *Zelber v. Hill*, 8 B. R. 239; s. c. 1 *Saw*, 268; in re *Geo. S. Ward*, 9 B. R. 349; in re *Holmes et al.*, 14 B. R. 493; in re *H. E. P. Jenks*, 15 B. R. 301.

If the attaching creditor is not the petitioning creditor for the adjudication of bankruptcy, this fact raises a presumption against the allowance of the claim for expenses. In re *Geo. S. Ward*, 9 B. R. 349.

Where the interval between the levying of the attachment and the filing of the petition in bankruptcy by another creditor is brief, the omission to file such petition is not unreasonable. *Ibid*.

Where the costs are incurred solely for the benefit of the attaching creditor, they can not be allowed. In re *Archenbrow*, 8 B. R. 429.

The attachment can not be sustained as against property which will be set apart to the bankrupt as exempt. In re *O. H. Preston*, 5 B. R. 293; in re *Ellis*, 1 B. R. 551. *Contra*, *Robinson v. Wilson*, 14 B. R. 565; s. c. 15 *Kans.* 595.

If the assignee files a petition to set aside a sale of exempted property made under an attachment, the petition will be dismissed with costs to the assignee personally. In re *C. H. Preston*, 6 B. R. 545.

If an attachment for a firm debt is laid upon the property of a firm composed of three members, of whom one only is bankrupt, it may be dissolved as to the interest of the latter, and bind the interests of other members. *Harrison v. Sterry*, 5 *Cranch*, 289; s. c. *Bee*, 244.

If the bankrupt is not a debtor to the firm, his interest may be considered to be his proportionate share of the property. *Ibid*.

While the lien created by an attachment continues, the sheriff may at any time demand a return of the property from a receiptor, and if it is refused, he has an immediate right of action, irrespective of the question whether it will or will not be needed for the payment of the debt on which it was attached. Such a liability will not be discharged or in any manner affected by the bankruptcy of the debtor. If the receiptor refuses to deliver the property to the sheriff, after an execution has been issued upon a judgment rendered in the attachment proceedings, he can not take advantage of his own fault and claim that the attachment has been dissolved. *Parks v. Sheldon*, 36 *Conn.* 466.

If an insolvent debtor in an attachment suit gives a bill of sale of the attached goods to a receiptor, with an understanding that the property shall be sold and the proceeds applied toward the payment of the debt of the attaching creditor, without regard to the attachment and without a demand perfected in an execution, that is a preference, but if the understanding is that the proceeds shall be held by the receiptor as security against his liability on his receipt, and applied to the debts only upon demand duly made on execution, the bill of sale is valid. *Parsons v. Topliff*, 14 B. R. 547; s. c. 119 *Mass.* 245.

Where the attachment was against an individual partner, a receiptor may show that the firm at the time of the attachment was insolvent, and subsequently became bankrupt, and that the property was firm property, and was delivered to the assignee. *Lewis v. Webber*, 116 *Mass.* 450.

If a judgment is entered in the attachment suit, even after the com-

mencement of the proceedings in bankruptcy, the subsequent discharge of the defendant will not relieve the receptor from liability. *Smith v. Brown*, 14 N. H. 67.

If the defendant fails to apply for a stay of the proceedings, and judgment is rendered against him, it is conclusive against his surety on the bond to dissolve the attachment, although the plaintiff proved his debt. *Cutter v. Evans*, 11 B. R. 448; s. c. 115 Mass. 27; *Haber v. Klauberg*, 15 B. R. 347; s. c. 4 Cent. L. J. 342.

The provisions of this clause do not apply to the collateral liability of sureties upon a bond given to dissolve the attachment, and by which the lien is discharged. The bond is not a mere substitute for the attachment. It does not merely restore the possession of the property to the debtor, subject to the attachment; it dissolves the attachment utterly. It is not given for the property itself, nor as security for its value; but for the payment absolutely of the judgment when recovered in suit, whatever may be its amount. It is not the equivalent of the attachment, and has not its incidents. The discharge, when obtained, may be pleaded in bar to the action, and the sureties on the bond may thus be released, even though the attachment was issued more than four months prior to the commencement of proceedings in bankruptcy. *Carpenter v. Turrell*, 100 Mass. 450; *Williams v. Atkinson*, 36 Tex. 16. Vide *Zollar v. Janvrin*, 49 N. H. 114; *Holyoke v. Adams*, 10 B. R. 270; s. c. 2 N. Y. Supr. 1; s. c. 8 N. Y. Supr. (Hun) 223.

Where an attachment issued more than four months before the commencement of the proceedings in bankruptcy, was dissolved by filing a bond, the bankrupt will not be allowed to file a supplemental answer setting up his discharge. *Holyoke v. Adams*, 13 B. R. 413; s. c. 59 N. Y. 233.

The bankrupt may give a bond to dissolve the attachment, although it was issued more than four months prior to his bankruptcy. *Braley v. Boomer*, 12 B. R. 303; s. c. 116 Mass. 527.

No matter or thing which has arisen since the judgment in the original writ can, upon review, be pleaded in bar of the original action. A plea of a subsequent discharge in bankruptcy is irregular, and can not defeat the attachment. *Zollar v. Janvrin*, 49 N. H. 114.

An action of review is merely a chose in action, which, in virtue of the adjudication of bankruptcy, became vested in the assignee. Whatever may be recovered upon the review, in the way of damages or costs, or in reduction of either, must be recovered by the assignee for the benefit of the creditors, whose rights, as well as those of the bankrupt, the assignee represents. If the action is prosecuted in the name of the debtor instead of the assignee's, the judgment must be for the adverse party. *Ibid*.

Every State court owes obedience to an act of Congress, concerning a matter within the power of Congress, as fully as a court of the United States. An adjudication of the district court of another State is equal in all respects to a similar adjudication by the district court of the State in which the attachment is pending. *Mixer v. Excelsior Co.*, 65 N. C. 552.

A proceeding by way of distress for rent, under the statute of the State

of Illinois, is in the nature of an attachment, and the property is attached upon mesne process; but the certificate given by the court, setting forth the amount found to be due to the landlord, together with the costs of court, is in the nature of final process. *In re Joslyn et al.*, 3 B. R. 473; s. c. 2 *Biss.* 235.

In Connecticut, the first attaching creditor has sixty days in case of personal property, and four months in case of real estate, after final judgment, within which to levy his execution, and thus enforce his attachment lien. After he has done so, or if his time has expired, then the second attaching creditor has the same length of time within which to levy his execution. The third attaching creditor has the same time after the second that the second does after the first; and so on till the property is exhausted or the attachments are all satisfied. The levy of an execution, while there is a subsisting prior incumbrance by attachment on the same property, is void. The assignee represents the creditors of the bankrupt, as well as the bankrupt himself, and can take advantage of any remedy which would be open to a subsequent attaching creditor. *Beers v. Place & Co.*, 5 B. R. 459; s. c. 36 *Conn.* 579; s. c. 1 *L. T. B.* 262.

No attachment made prior to the period of four months next preceding the commencement of proceedings in bankruptcy is dissolved. Not being dissolved, it remains in full force. When the attachment is so made prior to that time, the debtor's title to the property attached passes to the assignee, subject to the creditor's lien acquired by virtue of such attachment. The lien may be enforced by any requisite proceedings therefor which do not involve a judgment in personam. A judgment only to be enforced against the property attached, but not to be enforced against the person of the defendant, or any other property, may be entered, even though a discharge has been granted, and is pleaded in bar of the action. *Bates v. Tappan*, 3 B. R. 647; s. c. 99 *Mass.* 376; *Bowman v. Harding*, 4 B. R. 20; s. c. 56 *Me.* 559; *Samson v. Burton*, 4 B. R. 1; s. c. 5 *Ben.* 325; *Leighton v. Kelsey*, 4 B. R. 471; s. c. 57 *Me.* 85; *Perry v. Somerly*, 57 *Me.* 552; *Stoddard v. Locke*, 9 B. R. 71; s. c. 43 *Vt.* 574; *Daggett v. Cook*, 37 *Conn.* 341; *May v. Courtney*, 47 *Ala.* 185; *Peck v. Jenness*, 7 *How.* 612; *Ingraham v. Phillips*, 1 *Day*, 117; *Kittredge v. Emerson*, 15 *N. H.* 227; *Kittredge v. Warren*, 14 *N. H.* 509; *Davenport v. Tilton*, 51 *Mass.* 320; *Johnson v. Collins*, 116 *Mass.* 392; *Munson v. B. H. & E. R. R. Co.*, 14 B. R. 173; s. c. 120 *Mass.* 81; *Stockwell v. Silloway*, 113 *Mass.* 382. *Vide in re Bellows & Peck*, 3 *Story*, 428.

An attachment by garnishment gives a valid lien if made more than four months before the commencement of the proceedings in bankruptcy, although no notice was given to or process served on the bankrupt. *In re J. Q. A. Peck*, 16 B. R. 43.

The rules of law by which the amount for which the plaintiff is entitled to judgment is determined, are not affected by the bankruptcy of the defendant. *Johnson v. Collins*, 116 *Mass.* 392.

No special judgment can be entered to be enforced against the bond, if the defendant pleads his discharge, where the attachment was issued more than four months before the commencement of the proceedings in bank-

ruptcy, although the bond was filed after the adjudication of bankruptcy. *Hamilton v. Bryant*, 14 B. R. 479; s. c. 114 Mass. 543; *Fickett v. Durham*, 119 Mass. 159.

Where the attachment was laid more than four months prior to the commencement of proceedings in bankruptcy, no personal judgment should be rendered against the debtor if he pleads a discharge. *Shearon v. Henderson*, 38 Tex. 245.

If the State law allows a bond to dissolve an attachment to be filed at any time before judgment it can not be filed after a trial, but before the entry of a special judgment to bind the property. *Johnson v. Collins*, 12 B. R. 70; s. c. 117 Mass. 343.

A demurrer to a plea of discharge in bankruptcy is erroneous in an attachment suit. The proper practice is to file a replication stating the time of suing out the attachment, and the date of the proceedings in bankruptcy. *Gibson v. Green*, 45 Miss. 209.

The assignee should be made a party to the attachment suit, or at least be afforded the opportunity by citation to come in, if he will. He represents the creditors of the bankrupt, whose interests are entitled to protection. He takes the property attached, subject to all legal liens upon it, and in his hands he can interpose every defense open to the bankrupt, whether to the demand itself or to the attachment, interposing a defense, in his discretion, in the best interests of the estate. *Ibid*.

A creditor having a valid attachment, can at any time be prohibited from selling the property attached. The assignee has a right to free the estate from the attachment lien, if that course becomes advisable, and the district court can protect him in the exercise of that right, and interpose its authority at such time as may be most expedient or proper. *Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325; *Samson v. Clarke*, 6 B. R. 403; s. c. 9 Blatch. 372.

The lien of an attachment is incident to the process. It can not exist without it. When the process dies, the lien must necessarily die with it. How then can a lien of attachment on process issued by a State court be preserved and enforced in the Federal courts? *Daggett v. Cook*, 37 Conn. 341.

The return of the sheriff, showing a valid attachment, is conclusive, and can not be impeached by proofs *ab extra*. *Bowman v. Harding*, 4 B. R. 20; s. c. 56 Me. 559.

Where by law the plaintiff having a judgment may issue an attachment thereon, instead of any other execution, such an attachment is final and not mesne process. It is true it originates a new suit between the plaintiff and the garnishee, which may result in a judgment and execution against the latter, but this makes it none the less final process as against the defendant in the original judgment, and such process does not fall within the operation of this clause of the bankruptcy act. *The First National Bank of Baltimore v. Jagers*, 31 Md. 38; *Wilbur v. Wilson*, 2 W. N. 496; *Stewart v. Warden*, 1 W. N. 3.

The title to the property attached vests in the assignee as soon as the assignment to him is executed, and with this title he acquires the right to

immediate possession. He can not sue the sheriff by an action at law in the district court. Whether the attachment has ceased to have any binding force depends not only upon a proposition of law, but also upon two questions of fact — that is, whether the debtor has been adjudicated bankrupt, and whether he is entitled to the property. Of the principle of law, that bankruptcy operates to dissolve the attachment, the State court is bound to take judicial notice; but of the two facts stated it is not bound to take such notice. No court is bound to take judicial notice of the proceedings of another court. If material to a controversy before it, it must be informed thereof by the pleadings; and if the allegations are denied, they must be proved by the record. The State court should be informed in a proper way of the proceedings in bankruptcy before its possession of property held under an attachment is interfered with or assailed. It would be a violation of judicial comity, and provoke unseemly conflicts, to seize the property out of the hands of its officer. If the assignee desires possession of the property, and it is withheld, he must seek relief in the State courts. *Johnson v. Bishop*, 8 B. R. 533; s. c. 1 Wool. 324; *Doe v. Childress*, 11 B. R. 317; s. c. 21 Wall. 643.

The assignee can not treat the judgment in the attachment suit as a nullity, for he claims under the defendant by a transfer subsequent to the attachment. He may come in as a party, and can not, therefore, be regarded as a stranger to the judgment which may be rendered. *Kittredge v. Emerson*, 15 N. H. 227.

Where the attachment was issued more than four months prior to the commencement of the proceedings in bankruptcy, a purchaser at a sale under a decree made after that time acquires a title which can not be attacked collaterally by the assignee, although the assignee was not made a party to the suit. *Doe v. Childress*, 11 B. R. 317; s. c. 21 Wall. 643.

The sheriff is not liable to the assignee for the value of property sold under a *fiери facias* issued upon a judgment entered in an attachment suit after the commencement of the proceedings in bankruptcy, although the attachment was issued within four months before that time. *Bradley v. Frost*, 3 Dillon, 457. *Contra*, *Miller v. O'Brien*, 9 B. R. 26; s. c. 9 Blatch. 270.

If the plaintiff in an attachment suit, issued within four months before the commencement of the proceedings in bankruptcy, obtains a judgment and issues an execution after that time, under which the attached property is sold, he is liable to the assignee for the value. *Bracken v. Johnson*, 15 B. R. 106; s. c. 3 A. L. T. (N. S.) 637; s. c. 4 Cent. L. J. 9.

If judgment is entered and the property sold after the commencement of the proceedings in bankruptcy, the assignee may recover the proceeds from the attaching creditor. *Bradley v. Frost*, 3 Dillon, 457.

If real estate is subject to an attachment that is valid as against the assignee, the taxes thereon should be paid out of the fund realized therefrom if they were allowed and deducted from the valuation at the time of the levy. *Foster v. Inglee*, 13 B. R. 239.

If an attaching creditor pays off a prior incumbrance under the provisions of a State law, which gives him a right to be repaid from the pro-

ceeds of the property, he will, upon the dissolution of the attachment, be entitled to repayment from the proceeds received therefrom by the assignee. *Whithed v. Pillsbury*, 13 B. R. 241.

An attachment issued by a State court against a corporation more than four months before the commencement of the proceedings in bankruptcy, will not be dismissed for want of jurisdiction. *Munson v. B. H. & E. R. Co.*, 14 B. R. 173; s. c. 120 Mass. 81.

After a qualified judgment has been entered, the sheriff may maintain an action against the receiptor upon his receipt. *Lamprey v. Leavitt*, 20 N. H. 544.

The lien of an attachment upon property delivered to a receiptor follows the property into the hands of the debtor's assignee. *Rowe v. Page*, 13 B. R. 366; s. c. 54 N. H. 190.

If property taken under an attachment issued more than four months before the commencement of the proceedings in bankruptcy is delivered to a receiptor, the plaintiff is entitled to take a judgment in rem and levy an execution upon the money which may be collected from the receiptor. *Batchelder v. Putnam*, 13 B. R. 404; s. c. 54 N. H. 84.

If an attachment is laid in the hands of a garnishee prior to the period of four months next preceding the commencement of the proceedings in bankruptcy, it is not dissolved. *Hatch v. Seely*, 13 B. R. 380; s. c. 37 Iowa, 493.

If the defendant is adjudged bankrupt after the issue and levy of an attachment to perfect a mechanic's lien, an order of notice may be issued against the assignee to appear at the next term and show cause why judgment should not be rendered against the property attached for the lien, and if he neglects to appear the plaintiff may then proceed with his case and take a judgment in rem against the property. *Marston v. Stickney*, 55 N. H. 383.

Where the attachment is on both real and personal property, evidence that the attachment has by agreement been dissolved as to the personal property is incompetent, for it remains an existing lien on the real estate. A qualified judgment does not determine the right to levy on the personal property, but that question can be raised when the levy is made. *Bosworth v. Pomeroy*, 112 Mass. 293.

The commencement of proceedings in bankruptcy within four months after the issuing of an attachment renders it illegal for a receiptor who merely undertook to produce the property to satisfy any execution that might be issued on any judgment rendered therein to perform his contract, and releases him from the same. *Kaiser v. Richardson*, 14 B. R. 391; s. c. 5 Daly, 301.

The only right which a judgment creditor has under a levy made subsequent to an attachment, is an interest in the property subject to the attachment. When the attachment is dissolved, his right remains the same, and the assignee takes the interest covered by the attachment. The provisions of the act preserving existing securities do not indicate any intention to improve the condition of any creditor, or create new rights. In *re Julius Klancke*, 4 B. R. 648; s. c. 4 Ben. 326; in *re H. Badenhelm & Co.*, 15 B. R. 370.



The nature or comparative efficiency of the means provided by the statute to secure the property for the benefit of all the bankrupt's creditors does not affect the operation of the adjudication of bankruptcy to bring all his assets at once into the custody of the law, and prevent their subsequent attachment by one creditor for his own benefit. A sheriff who makes an attachment, pending the proceedings in bankruptcy, can not dispute the title of a party who claims the property by a transfer from the debtor, on the ground that such transfer is fraudulent. *Williams v. Merritt*, 4 B. R. 706; s. c. 103 Mass. 184.

The sheriff, in an action against him for neglecting to execute an attachment, can not excuse the nonperformance of his duty by averring that its discharge might not have availed the plaintiff to satisfy his debt, because the bankruptcy law might have intervened and taken the property, when attached, from the custody of the State law. The plaintiff had the right to have the command of his process obeyed, and the attachment made by the sheriff, whether it availed him or not. *Carlisle v. Soule*, 44 Vt. 265.

If proceedings in bankruptcy are commenced within four months after the garnishment, the garnishee who pays the money under an execution upon a judgment subsequently rendered is liable to the assignee therefor, although he was ignorant of such proceedings. *Duffield v. Horton*, 16 B. R. 59; s. c. 17 N. Y. Supr. 140.

The assignee is entitled to the money although a judgment was entered and an execution issued in the attachment suit after the commencement of the proceedings in bankruptcy, for the statute discharges the property then held by the attachment, and not merely such as may be so held at the time of the execution of the assignment. *B. & M. Ins. Co. v. Davenport*, 17 N. Y. Supr. 264.

If the debt of the attaching creditor exceeds the value of the property attached, the dissolution of the attachment will not entitle a judgment creditor to priority who levied an execution on the property after the attachment and before the commencement of the proceedings in bankruptcy. *In re Roscoe R. Steel*, 16 B. R. 105.

If an attaching creditor obtains judgment and levies an execution on the property, the lien of the execution relates back to the attachment and he is entitled to a lien as against the assignee although another creditor laid an attachment after his, and before the execution and the last attachment, were dissolved by bankruptcy. *Ibid.*

**Act of 1898, CH. 3, § 6. Exemptions of Bankrupts.**—(a) This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

ACT OF 1898, CH. 5, \* \* \* § 43. **Duties of Trustees.**— (a) Trustees shall respectively \* \* \* (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

Under statute of Colorado a merchant is not entitled to an exemption of \$200 worth of goods as stock in trade; he is entitled to a horse as working animal, but not to a buggy. In re Peabody, 16 B. R. 243.

Individual partners of bankrupt mercantile partnership not entitled to claim as exempt, under statutes of Wisconsin, each the sum of \$200 out of the partnership stock. In re Hughes & Teague, 16 B. R. 464.

Interest of tenant in common, not exceeding \$5,000 in value, in dwelling-house and land actually occupied by him as homestead is, by Nevada constitution and laws, exempt from forced sale. In re Swearinger & Lamar, 17 B. R. 138.

Where partnership is insolvent, one member of firm can not, upon retiring, withdraw beyond reach of creditors and to their injury a portion of the assets, and make a personal appropriation of those assets by placing them in form of a homestead. In re Sauthoff & Olson, 16 B. R. 181.

Under such circumstances, though in form of a homestead, the property is as much within reach of a court of equity as before; and no such change in its character can give it new sacredness, or endow its possessor with new privileges in its ownership or use. Ibid.

A bachelor may be considered as head of a family, and entitled to homestead exemption, when his widowed sister resided with and kept house for him, regarding it as her home. Bailey v. Comings, 16 B. R. 382.

Right to such exemption not abandoned by residence of bankrupt for a time at another place, occasioned by his ill-health. Ibid.

Where a certain sum is allowed by statute to be invested in a homestead, such sum may be put into an undivided part interest in a homestead, and into premises to which others hold the legal title. Johnson v. May, 16 B. R. 425.

Where a larger sum than the statute allows was invested, method of reaching same pointed out. Ibid.

Under laws of Alabama, claim of homestead exemption must be asserted before a sale. Steele v. Moody, 16 B. R. 558.

If bankrupt fails to claim such exemption in his schedules he must be deemed to have waived it. And if he has misdescribed it in same the bankruptcy court alone has power to correct such error. Ibid.

Under homestead exemption law of Georgia lands, etc., claimed to be exempt must be laid off and designated as such before the debtor is entitled to such exemption, although such lands had been previously set apart to him in proceedings in bankruptcy as exempt under such law. Darsey v. Mumpford, 17 B. R. 181.

Partnership assets are a trust fund for payment of firm debts, and no exemptions can be set apart from them to the individual partners until all partnership debts are paid. In re Croft Bros., 17 B. R. 324.

Within a month prior to commencement of proceedings in bankruptcy, and while the firm was insolvent, a large amount of partnership property was sold, and the proceeds divided between the partners, and the firm then offered to settle with their creditors at fifty per cent. One partner, upon receiving his share of proceeds of said sale, immediately purchased property exempt under the State statutes. Held, that under the circumstances such property was not exempt, but must be regarded as partnership assets held in trust for creditors. *In re Melvin & Fox*, 17 B. R. 543.

Under Oregon code, bankrupt not entitled to wagon and team as exempt, unless he personally follows some trade, occupation or profession to the carrying on of which such wagon and team is necessary, nor unless he habitually earns his living by such trade, occupation or profession. *In re Parker & Morris*, 18 B. R. 43.

The business of merely buying and selling, or directing or employing labor of others, is not a trade, occupation or profession within the statutes.

It is for the benefit of those who live by their own labor, and require therefor the use of some of the articles enumerated therein. *Ibid*.

By Wisconsin statute, a merchant is entitled to \$200 exemption of stock in trade, and in absence of fraudulent intent partners may dissolve partnership, one partner sell his interest to the other, and the partner continuing in interest be allowed to claim his exemption from the stock, though the partnership at the time of dissolution owed debts in excess of assets. *In re Bjornstad*, 18 B. R. 282.

Acts of 1867 and 1874, § 5045. There shall be excepted from the operation of the conveyance the necessary household and kitchen furniture and such other articles and necessities of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; also the wearing apparel of the bankrupt, and that of his wife and children, and the uniform, arms and equipments of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws of each State, as existing in the year eighteen hundred and seventy-one; and such exemptions shall be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after

the same, and against liens by judgment or decree of any State court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding. These exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee; and in no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this Title; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court.

Statutes revised — March 2, 1867, § 14, 14 Stat. 522; June 8, 1872, ch. 330, 17 Stat. 334; March 3, 1873, ch. 235, 17 Stat. 577. Prior Statutes — April 4, 1800, ch. 19, §§ 18, 34, 35, 53, 2 Stat. 26, 30, 31, 34; Aug. 19, 1841, ch. 9, § 3, 5 Stat. 442.

**What Property May be Exempted.**—Exempted property does not pass to the assignee. It is excepted, by this section and Form No. 18, from the operation of the assignment. *In re Lambert*, 2 B. R. 426; *Rix v. Capitol Bank*, 2 Dillon, 367.

The bankruptcy act secures to the bankrupt certain parts of his estate which are set off to him free from the claims of creditors. Of these he, in fact, becomes the purchaser, the consideration for the purchase being the surrender of all his estate, and the sanction for his title being in the supreme law of the land. The lien of a creditor upon property so set apart can not, therefore, be enforced. *In re Hambricht*, 2 B. R. 498; s. c. 2 L. T. B. 61; s. c. 1 C. L. N. 201.

A bankrupt who has received his discharge has no standing in court to ask for an exemption not existing at the time of his discharge. *In re Kean et al.*, 8 B. R. 367.

The assignee is not entitled to any of the exempted property, and it is no concern of his who may have the right to it. Upon the death of the bankrupt the title to such property vests in his executor or administrator. *In re Hester*, 5 B. R. 285.

When the partnership assets are not exempted from execution by the State laws, the bankrupt is not entitled to any portion of them. All the provisions of the exemption clause, except the last, relate only to the separate property of the bankrupt. *In re Hafer*, 1 B. R. 457; *Anon.*, 1 B. R. (quarto) 187.

Where property that would be exempted under the bankruptcy act has been seized and sold under an attachment on mesne process, which is subsequently dissolved by the commencement of proceedings in bankruptcy, the bankrupt is entitled to the fund, and he need not wait to ascertain if the assignee will be able to collect enough from the assets assigned to pay the expenses of the proceedings. The expenses are to be paid from the assets of the bankrupt when collected, but not from property which is exempt from the assignment. The same property which is exempted upon

a petition filed by the debtor is also exempted where the proceedings are commenced by creditors. In *re Ellis*, 1 B. R. 551.

The exemption may be allowed, although the property has within four months prior to the petition been attached on mesne process. In *re W. S. Stevens*, 5 B. R. 298; s. c. 2 Biss. 373.

A sale after the filing of the petition in bankruptcy, of property exempt both by the bankruptcy act and the State law, under a levy made prior to the commencement of proceedings in bankruptcy, will be set aside. In *re J. H. Griffin*, 2 B. R. 254; s. c. 2 L. T. B. 23.

A bankrupt is entitled to an exemption of his household furniture and other necessary articles, although they were taken under an execution prior to the commencement of the proceedings in bankruptcy. In *re Nicholas Martin*, 13 B. R. 397; in *re John Owens*, 12 B. R. 518; s. c. 6 Biss. 432.

If the bankrupt, after filing his petition in bankruptcy, takes the benefit of the State insolvent law, he must file an account of his property, for the exempt property does not pass to the assignee, nor is the title of the bankrupt thereto impaired or affected. *Bulymore v. Cooper*, 2 Lans. 71; s. c. 46 N. Y. 236.

The estate of the bankrupt may be all personal property, and every article may be subject to a lien to secure a debt owing to some one or another creditor. By the operation of the bankruptcy law, no such lien, except at the option of its holder, would be extinguished. Every such lien would constitute for the person holding it a special property in the thing covered by the lien, and might be the most valuable part of his estate, and for the law to divest it might be to make one bankrupt in the endeavor to relieve another. In *re O. H. Preston*, 6 B. R. 545.

Property can not be exempted to the prejudice of a creditor who holds a valid vendor's lien thereon. The lien must prevail; Congress did not intend that the bankruptcy act should override cases of that nature. In *re Perdue*, 2 B. R. 183; s. c. 2 W. J. 279; in *re Whitehead*, 2 B. R. 599; in *re Jas. B. Brown*, 3 B. R. 250; s. c. 2 L. T. B. 122; s. c. 1 O. L. N. 409; in *re Hutto*, 3 B. R. 787; s. c. 1 L. T. B. 226; s. c. 3 L. T. B. 197.

Where the property claimed to be exempted is subject to a mortgage, the assignee will discharge his whole duty if he designates the exempted property, and then leaves the bankrupt and mortgagee to settle their respective rights by themselves. In *re Lambert*, 2 B. R. 426.

A mortgage, though fraudulent and void as against creditors, is good as between the parties. A decree of the district court, declaring a mortgage fraudulent as against creditors, does not affect its validity as between the parties, nor its operation upon property in which the creditors have no rights. A mortgagee who has done nothing by proof of his debt or otherwise to waive his mortgage, may hold the exempted property as security for his debt, and this right can not be affected by the bankrupt's discharge. *Tuesday v. Robinson*, 103 Mass. 558.

The bankrupt can not claim any exemption in property conveyed by him prior to the commencement of proceedings in bankruptcy in fraud of his creditors, and afterward recovered to the estate. The sale is good as

against him, and in attempting to place his property beyond the reach of his creditors, he placed his exemption beyond his own reach. In *re Graham*, 2 Biss. 449; *Keating v. Keefer*, 5 B. R. 133; s. c. 1 L. T. B. 266; s. c. 4 L. T. B. 162; in *re Dillard*, 9 B. R. 8; s. c. 6 L. T. B. 490. *Contra*, *Bartholomew v. West*, 8 B. R. 12; s. c. 2 Dillon, 290; *Cox v. Wilder*, 5 B. R. 443; s. c. 7 B. R. 241; s. c. 2 Dillon, 132; s. c. 5 L. T. B. 500; *Penny v. Taylor*, 10 B. R. 200; *McFarland v. Goodman*, 11 B. R. 134; s. c. 6 Biss. 111; s. c. 13 A. L. Reg. 697.

If a transfer of exempted property is surrendered as a preference by the grantee, the debtor may claim his exemption. In *re Detert*, 11 B. R. 293; s. c. 14 A. L. Reg. 166; s. c. 7 C. L. N. 130.

If the assignee proceeds to sell exempted property, or to treat it as assets, the court, on the application of the bankrupt, will restrain him. The district court has no concern with the property exempt under a State law, and will not enjoin a judgment creditor from selling it. The decision of the rights of the parties properly belongs to the tribunals of the State under whose laws they are claimed. In *re C. Hunt*, 5 B. R. 493; s. c. 2 L. T. B. 197; s. c. 4 C. L. N. 5; s. c. 2 Pac. L. R. 146; in *re Fetherston*, 5 C. L. N. 193; s. c. 20 Pitts. L. J. 77; in *re Jared Everett*, 9 B. R. 90. *Vide* in *re W. S. Stevens*, 5 B. R. 298; s. c. 2 Biss. 373.

The exemption relates back to the filing of the petition. The exempted property in contemplation of law remains the property of the bankrupt, subject to all legal incumbrances. A lien on articles so exempted, can not be enforced in the bankruptcy court, because that court has not possession of the articles the lien affects. It has sent them beyond or rather declined to receive them within its jurisdiction, and would need to obtain jurisdiction, setting aside the action of the assignee, before it could enforce the lien. Only such liens as are on property in the possession of the court will be enforced by it. In *re C. H. Preston*, 6 B. R. 545. *Contra*, in *re Wylie*, 5 L. T. B. 330.

The bankruptcy court has no jurisdiction to order a sale of the exempted property, although some of the creditors hold notes waiving the benefit of the exemption laws. In *re Miles Bass*, 15 B. R. 453; s. c. 9 C. L. N. 303; s. c. 13 Pac. L. R. 190.

After a decree has been entered declaring that the bankrupt is not entitled to a homestead, an order may be passed requiring him to vacate the premises, although his wife lives with him. In *re Boothroyd & Gibb*, 15 B. R. 368.

If a person takes a mortgage after the entry of a decree declaring that the bankrupt is not entitled to the premises as a homestead, an order may be entered on a summary petition requiring the mortgagee to discharge his mortgage. *Ibid*.

If a mortgagee who holds a mortgage upon land claimed as a homestead, but worth more than the law allows to be exempt, proves his claim and obtains a sale of the property, the purchaser may obtain an order from the bankruptcy court upon the bankrupt to surrender the possession thereof. In *re Betts*, 15 B. R. 536; s. c. 4 Cent. L. J. 558; s. c. 13 Pac. L. R. 203.

If a judgment creditor did not prove his debt, he may enforce his lien against the land set apart as a homestead, as soon as the bankrupt abandons it, although he obtained a discharge. *Jackson v. Allen*, 30 Ark. 110.

A State court can not review the action of the bankruptcy court in directing the assignee to sell exempted property to satisfy a mortgage existing thereon. *Maxwell v. McCune*, 10 B. R. 306; s. c. 37 Tex. 515.

If a creditor has a mortgage upon the bankrupt's homestead, he may be required to exhaust that remedy before he can enforce his other remedies against the bankrupt's estate. In *re Sauthoff & Olson*, 14 B. R. 364; s. c. 8 C. L. N. 370; s. c. 3 Cent. L. J. 544.

The assignee in bankruptcy is not a judicial officer. His act in designating and setting apart exempt property is not a judgment in rem conclusive against all the world. His act of setting apart property to the bankrupt under the exemption clause of the bankruptcy act, does not divest the valid lien of a judgment creditor, nor invalidate the title of a purchaser at a sheriff's sale under execution upon that judgment. *Fehley v. Barr*, 66 Penn. 196; *Bush v. Lester*, 15 B. R. 36; s. c. 55 Ga. 579.

The allotment of property by the assignee as exempt does not impair the lien of a judgment. *Haworth v. Travis*, 13 B. R. 145; s. c. 67 Ill. 301.

If a mortgagee neither appears in the bankruptcy court nor is brought in by adverse proceedings, he may foreclose his mortgage in a State court although the property has been set apart to the bankrupt as exempt. *Hatcher v. Jones*, 14 B. R. 387; s. c. 53 Ga. 208; *Cumming v. Clegg*, 14 B. R. 49; s. c. 52 Ga. 605.

The assignee should first ascertain what is exempt under the State laws. If the bankrupt, under the State laws, has selected his furniture, he can not have any other allowance in lieu thereof. In *re Noakes*, 1 B. R. 592; in *re Ruth*, 1 B. R. 154; s. c. 7 A. L. Reg. 157; s. c. 6 Phila. 438.

The sheriff can not protect himself from an action for levying upon exempted property, nor mitigate the damages by showing a delivery upon demand to the assignee even under protest. The assignee has no right of his own motion, and without an order of the court, to take exempted property which has been levied upon by the sheriff, and compel the bankrupt to abandon his remedy against the sheriff, and follow the assignee into the district court. Nothing which transpires after the taking of the property and the refusal to deliver it when demanded, can defeat the action or mitigate the damages below the value of the property at the time of the conversion and interest. *Wilkinson v. Walt*, 44 Vt. 508.

**Exemption under the Bankruptcy Act.**—The true construction of this clause will allow the bankrupt the following exemptions without qualifications, viz:

1. Necessary household and kitchen furniture to an amount not exceeding \$500.
2. Wearing apparel of the bankrupt, his wife, and children.
3. Uniform, arms, and equipments, if the bankrupt has been or is in the military service of the United States.
4. Other property exempt by the laws of the United States; and
5. Property exempt by State laws of different species from that already specified.

In addition to the foregoing, it is the duty of the assignee, in the exercise of a sound legal discretion, taking into consideration "the family, condition, and circumstances of the bankrupt," to set apart other articles and necessities, but so that, with the household and kitchen furniture, the amount shall not exceed the sum of \$500. In considering the family, the assignee must have regard to the number composing it; in inquiring after the condition, he must ascertain the social status, and whether ill health prevails or not; and, in regard to the "circumstances," he must inquire how the bankrupt is employed, what is his income, and, if any, how many of the family earn their own living, and whether they contribute to the support of others; and, also, how much and what property the bankrupt is entitled to under the State laws. In *re Feely*, 3 B. R. 66; s. c. 15 Pitts. L. J. 291; in *re Ziba Williams*, 5 Law Rep. 155; in *re Edward H. Ludlow*, 1 N. Y. Leg. Obs. 322.

The words import a limitation upon the amount to be allowed to the bankrupt. It is in no case to exceed the sum of \$500; but it may be below that, and vary according to the circumstances of particular cases from a very small allowance up to the full sum. In *re Ziba Williams*, 5 Law Rep. 155.

Every bankrupt is entitled to have his necessary household and kitchen furniture exempted from the operation of the bankruptcy act, to any amount not exceeding \$500. The furniture so exempted must be necessary. It can not be necessary, in the sense of the law, unless the bankrupt is a householder — the head of a family. He need not have a wife; his household may consist of servants, or any person residing with him and under his control. In exempting other articles, the assignee has a discretionary power, but his discretion must be a sound legal discretion. The furniture and the other exempted articles must not exceed \$500. In *re Cobb*, 1 B. R. 414; s. c. 1 L. T. B. 59; in *re Noakes*, 1 B. R. 592; in *re Ruth*, 1 B. R. 154; s. c. 7 A. L. Reg. 157; s. c. 6 Phila. 438.

The act evidently intends that every bankrupt householder shall be permitted to retain as much household and kitchen furniture as may be reasonably necessary to enable him to keep house in a plain and convenient manner. The fact that his wife may have, as her separate property, household and kitchen furniture in use in the house in which the bankrupt resides, can make no difference. Such separate property does not belong to him; he has no right to its possession and control, and she may, at any moment and against his will, remove and dispose of it. The bankruptcy act does not intend to make a man dependent upon his wife for the necessary means of keeping house. In *re Cobb*, 1 B. R. 414; s. c. 1 L. T. B. 59; in *re D. H. Tonne*, 13 B. R. 170.

This action, so far as it relates to "necessary household and kitchen furniture," is imperative on the assignee, though he must judge and determine what furniture of the kind described is under the circumstances necessary. In *re W. H. Thiel*, 1 Biss. 241.

In exempting articles other than household or kitchen furniture, an exemption to the full amount of \$500 should not be made without discrimination. The allowance is conditional, and is measured with reference not



merely to value, but also to subjects and their suitability to personal requirements. In *re Ruth*, 1 B. R. 154; s. c. 7 A. L. Reg. 157; s. c. 6 Phila. 438.

In making an allowance for "other articles and necessities," the assignee should not allow anything of mere luxury or ornament. Gold watches, silver watches, pianos, and the like, are not embraced in the discretionary power of the assignee. In *re Cobb*, 1 B. R. 414; s. c. 1 L. T. B. 59; in *re Graham*, 2 Biss. 449; in *re Chester S. Kasson*, 5 Law Rep. 489; in *re Edward H. Ludlow*, 1 N. Y. Leg. Obs. 322; in *re W. H. Thiel*, 4 Biss. 241.

The other necessary articles should be ejusdem generis as to utility to the family with those specifically enumerated. In *re E. D. Comstock*, 1 N. Y. Leg. Obs. 326; in *re Ziba Williams*, 5 Law Rep. 155.

The phrase "other articles" is a very indefinite expression. It may include family pictures, keepsakes, a cheap watch or clock, and many other things of small value. In *re W. H. Thiel*, 4 Biss. 241.

The statute contemplates only that description of property which is palpably of immediate necessity to the bankrupt or his family. The "other articles and necessities" ought accordingly to be understood as having relation to things not precisely furniture or wearing apparel, but manifestly useful to the individual or his family in a like sense. In *re Edward H. Ludlow*, 1 N. Y. Leg. Obs. 322.

"Other articles or necessities" do not include articles of mere fancy, taste or convenience. *Ibid.*

The term "necessaries" may include things other than household and kitchen furniture. It may, for example, include the tools of a tradesman and the books of a professional man. In *re W. H. Thiel*, 4 Biss. 241.

Cases may exist where a moderate quantity of material for carrying on a trade may be fairly comprehended under the term "other articles." *Ibid.*

The phrase "other articles" does not include manufactured articles kept for sale. *Ibid.*

A cow may or may not be necessary, according to circumstances. In *re Ziba Williams*, 5 Law Rep. 155.

A pew can not be set apart as a necessary. It is no more than desirable or convenient. In *re E. D. Comstock*, 2 N. Y. Leg. Obs. 326.

The auction stand and flag of an auctioneer may be exempt, as things in daily use and necessary to his business. In *re Edward H. Ludlow*, 1 N. Y. Leg. Obs. 322.

Clocks and desks which are not peculiar to the bankrupt's employment can not be set apart, for they are mere conveniences. *Ibid.*

A fowling piece, fishing tackle, paintings or breast-pins are not necessities. *Ibid.*

The common implements or tools of trade by which a daily support is gained, may justly be ranked as necessities. *Ibid.*

A clock is not a necessary. In *re Ziba Williams*, 5 Law Rep. 155.

Silver spoons may or may not be necessary, according to circumstances. *Ibid.*

A family sewing machine may be set apart as a necessary article. In re Graham, 2 Biss. 449.

Provisions may be allowed as necessary articles. In re Cobb, 1 B. R. 414; s. c. 1 L. T. B. 59; in re Edward H. Ludlow, 1 N. Y. Leg. Obs. 322.

The term "other articles and necessities" can not be so construed as to embrace land. A fair and proper construction of this section, as well as the true spirit and object of the law, will not justify or authorize such an exemption. In re Thornton, 2 B. R. 189; s. c. 8 A. L. Reg. 42. *Contra*, in re Edwards, 2 B. R. (quarto) 109.

Under the head of other articles and necessities, money may be allowed, for it not infrequently happens that money is quite as necessary to the temporary subsistence of a bankrupt and his family as any articles that can be mentioned. In re Thornton, 2 B. R. 189; s. c. 8 A. L. Reg. 42; in re Lawson, 2 B. R. 54; in re Ira Hay, 7 B. R. 344; in re Benjamin B. Grant, 2 Story, 312; in re James Thompson, 13 B. R. 300. *Contra*, in re Welch, 5 B. R. 348; s. c. 5 Ben. 230.

When the money is the proceeds of articles which could and ought to be set apart under the head of "other articles and necessities," it may be exempt. The items of the property that has been sold should be stated, so that it may be determined whether they come within the description of "other articles and necessities." In re Welch, 5 B. R. 348; s. c. 5 Ben. 230.

A gold watch or breast-pin is not wearing apparel. In re Edward H. Ludlow, 1 N. Y. Leg. Obs. 322.

The exemption should be so made as not to operate adversely to the interests of the creditors. In re Edwards, 2 B. R. (quarto) 109.

When the property is incapable of division, it may be sold, and the exemption allowed out of the proceeds. In re Jas. B. Brown, 3 B. R. 250; s. c. 2 L. T. B. 122; s. c. 1 C. L. N. 409.

Under the provision of section 986 the practice of the Federal and State courts is in general the same as to the exemption of the property of debtors. In re Ruth, 1 B. R. 154; s. c. 7 A. L. Reg. 157; s. c. 6 Phila. 438; in re Appold, 1 B. R. 621; s. c. 6 Phila. 469; s. c. 1 L. T. B. 83.

If no rule has been adopted by the Federal court of the State, no exemption can be claimed under section 986. In re E. A. Vogler, 8 B. R. 132.

The property exempt by the territorial statutes from levy and sale on execution may be allowed. In re McKercher & Pettigrew, 8 B. R. 409.

**Exemptions under State Laws.**—The words "other property not included in the foregoing exceptions" mean property other than and not included among the articles set apart under the first clause, and embrace all the property, whether of the same or a different kind, which is by State law exempted from forced sale. In re Irwin Davis, 2 Saw. 255.

The assignee can not set apart to the bankrupt, under the State law, any property specifically exempted by the bankruptcy act, but he may set apart any property not so designated. It is not necessary that the State law should name specifically the articles of property exempted by it. In re Feely, 3 B. R. 66; s. c. 16 Pitts. L. J. 291.

The system of bankruptcy is, in a relative sense, uniform throughout the United States, when the assignee takes in each State whatever would

have been available to the recourse of execution creditors if the bankruptcy law had never been passed. Though the States vary in the extent of their exemptions, yet what remains the bankruptcy law distributes equally among the creditors. The bankruptcy act does not in any way vary or change the rights of the parties. All contracts are made with reference to existing laws, and no creditor could recover more from his debtor than the unexempted part of his assets, and as the thing is attained by the bankruptcy law, it is uniform. *In re Beckerkorb*, 4 B. R. 203; s. c. 1 Dillon, 45; s. c. 1 L. T. B. 241; *in re Jordan*, 8 B. R. 180; *in re Appold*, 1 B. R. 621; s. c. 6 Phila. 469; s. c. 1 L. T. B. 83; *in re Ruth*, 1 B. R. 154; s. c. 7 A. L. Reg. 157; s. c. 6 Phila. 438; *in re Wylie*, 5 L. T. B. 330; *in re Daniel Deckert*, 10 B. R. 1; s. c. 1 A. L. T. (N. S.) 336; s. c. 9 A. L. J. 390; s. c. 6 C. L. N. 310.

A bankruptcy law to be constitutional must be uniform, and whatever rule it prescribes for one, it must for all. If it provides that certain kinds of property shall not be assets under the law in one place, it must make the same provision for every other place within which it is to have effect. The provision that in each State property specified in the laws thereof, whether actually exempted by virtue thereof or not, shall be exempted, is unconstitutional and void. *In re Daniel Deckert*, 10 B. R. 1; s. c. 1 A. L. T. (N. S.) 336; s. c. 9 A. L. J. 390; s. c. 6 C. L. N. 310; *in re Kerr & Roach*, 9 B. R. 566; *in re Geo. W. Dillard*, 9 B. R. 8; s. c. 6 L. T. B. 490; *in re George Duerson*, 13 B. R. 183; *in re Shipman*, 14 B. R. 570; *Bush v. Lester*, 15 B. R. 36; s. c. 55 Ga. 579. *Contra*, *in re Kean et al.*, 8 B. R. 367; *in re John W. Smith*, 8 B. R. 401; s. c. 6 C. L. N. 33; *in re Willis A. Jordan*, 10 B. R. 427; *in re John W. A. Smith*, 14 B. R. 295; s. c. 2 Woods, 458.

The uniformity required is as to the general policy and operation of the law. The bankruptcy act in some minor particulars must necessarily operate differently in the different States. Thus, the bankruptcy law regards as valid the legal and equitable liens existing by law in the several States, and as the nature, force, and effect of such liens are dependent upon the local laws, they will in some respects be different in the different States. *In re Jordan*, 8 B. R. 180.

When the property is incumbered by a lien, it is only the bankrupt's sub modo. The lien creditor has a vested interest in it also, and the bankrupt can only be allowed an exemption out of such estate as remains to him after the vested interests of others have been satisfied. *In re Geo. W. Dillard*, 9 B. R. 8; s. c. 6 L. T. B. 490; *in re Daniel Deckert*, 10 B. R. 1; s. c. 1 A. L. T. (N. S.) 336; s. c. 9 A. L. J. 390; s. c. 6 C. L. N. 310. *Contra*, *in re Jordan*, 8 B. R. 180; *in re Kean et al.*, 8 B. R. 367; *in re John W. Smith*, 8 B. R. 401; s. c. 6 C. L. N. 33; *in re Jared Everett*, 9 B. R. 90.

A State exemption law which attempts to divest a prior judgment lien impairs the obligation of contracts, and is unconstitutional. *In re Jared Everett*, 9 B. R. 90.

An act of Congress can not give validity to a State law which is unconstitutional. *In re Geo. W. Dillard*, 9 B. R. 8; s. c. 6 L. T. B. 490.

The establishment of a uniform system of bankruptcy involves the idea of a discharge greater or less from precedent obligations. So far Congress

has the right to impair the obligation of contracts. It is also clearly within the competency of Congress to grant a retrospective exemption, so as to discharge antecedent obligations. Congress may, if it chooses, insert a homestead provision, making it good against debts already contracted, although its inevitable effect would be to impair the obligation of contracts, for the simple reason that the power to such an end is expressly given by the Constitution. Congress, in the enactment of a bankruptcy law, has the power to make exemptions embracing past as well as future debts. In *re Wylie*, 5 L. T. B. 330; in *re Kean et al.*, 8 B. R. 367; in *re E. A. Vogler*, 8 B. R. 132; in *re John W. Smith*, 8 B. R. 401; s. c. 6 C. L. N. 33; in *re Jared Everett*, 9 B. R. 90.

The relation of the bankrupt to his property is fixed in voluntary bankruptcy the moment he files his petition, and in involuntary bankruptcy as soon as he is adjudicated a bankrupt. The rights of his creditors to his estate are determined at the same time. What the homestead exemptions are at these times both the bankrupt and his creditors are presumed to know. He petitions and they resist, or they petition and he resists, with a full knowledge of the then existing law of bankruptcy. Every bankrupt and his creditors are concluded as to his and their interest in the estate by the law of bankruptcy then existing. What is then surrendered must be distributed, and what is then exempt he may retain. In *re Geo. W. Dillard*, 9 B. R. 8; s. c. 6 L. T. B. 490; in *re Kerr & Roach*, 9 B. R. 566. Contra, in *re E. A. Vogler*, 8 B. R. 132; in *re Kean et al.*, 8 B. R. 367; in *re Wylie*, 5 L. T. B. 330.

When Congress chooses to add to its own list of exemptions further exemptions under the State laws, it refers the Federal courts, in their action thereupon, to the State laws. A statute consists not merely of its terms, but of the judicial expositions thereof. If a law of the State has been construed by the highest court of the State, the Federal courts are bound by that construction. In *re Wylie*, 5 L. T. B. 330.

A bankrupt is entitled to the exemption allowed by the State laws in force in 1871, although those laws have since been amended so as to reduce the amount. In *re Albert Cohen*, 3 Dillon, 295.

If the State law was changed during the year 1871, the exemption can only be allowed according to the law that was in force at the close of the year. In *re Anthony Baer*, 14 B. R. 97.

The bankrupt can not claim any exemption out of property conveyed away prior to the commencement of proceedings in bankruptcy. In *re Jared Everett*, 9 B. R. 90.

Where a homestead has been duly allotted under the State law, and there is no fraud, such allotment will be recognized and allowed. In *re E. A. Vogler*, 8 B. R. 132.

Where an allotment has not been made previous to the commencement of proceedings in bankruptcy, the homestead may be ascertained and set apart by the assignee. *Ibid.*

Where no fraud is alleged, an allotment of a homestead under a State law will not be set aside for mere excess of value. Where fraud, complicity, or irregularity are alleged and established by proper special pro-

ceedings, the allotment of homestead may be set aside in the State courts, and in such cases similar relief will be furnished in the bankruptcy court. Mere excess of value in the allotment is not fraud, and to successfully impeach such proceedings it must be shown that the debtor by some fraudulent representation or deception, or by complicity with the appraisers, procured such excessive allotment. *In re Jack Hall*, 9 B. R. 366.

A judgment of the court of ordinary allowing an exemption creates a lien upon the property set apart. An appeal does not vacate but merely suspends the judgment until the case is reviewed and passed upon by the appellate court. If the judgment was rendered prior to the commencement of proceedings in bankruptcy, the assignee should become a party to the proceedings on appeal if he desires to contest it. *In re Moseley, Wells & Co.*, 8 B. R. 208.

The allowance of the exemption in the bankruptcy court does not affect the property with the local restrictions in regard to title and power of disposition as if it had been set apart under the State law. *Farmer v. Taylor*, 15 B. R. 515; s. c. 56 Ga. 550.

The property exempted by this clause is in addition to that exempted by the preceding clauses. *In re Ruth*, 1 B. R. 154; s. c. 7 A. L. Reg. 157; s. c. 6 Phila. 438; *in re Cobb*, 1 B. R. 414; s. c. 1 L. T. B. 50.

If the State law allows personal property to a certain amount to be selected by the debtor, he may claim that amount in addition to what is allowed by the bankruptcy law itself. *In re Hezekiah*, 11 B. R. 573; s. c. 2 Dillon, 551.

The bankruptcy act expressly limits the exemptions to be allowed a bankrupt in bankruptcy to the State exemption laws in force in 1871. When his wife makes an application in the State court to have the homestead set apart on the same day that he files his petition, the exemption may be considered as a transfer which is void under section 5129. The survey and setting apart of the homestead by the State court after the commencement of proceedings in bankruptcy are null and void. *In re Askew*, 3 B. R. 575.

The exemptions are regulated by the laws of the State where the bankrupt has his domicile, although the property is located in another State. *In re W. S. Stevens*, 5 B. R. 298; s. c. 2 Bliss. 373.

As to the subjects of the claim for an exemption under the State law, the only function of the assignee is to see to their proper appraisal. In seeing to it, he should proceed as conformably to the laws of the State as may be possible. *In re Ruth*, 1 B. R. 154; s. c. 7 A. L. Reg. 157; s. c. 6 Phila. 438; *Fehley v. Barr*, 66 Penn. 106; *in re Feely*, 3 B. R. 66; s. c. 15 Pitts. L. J. 291; *in re Kean et al.*, 8 B. R. 367.

A waiver by the bankrupt of his homestead rights in favor of a particular creditor, does not confer any special rights upon his general creditors, nor operate in their favor. The bankrupt is, therefore, entitled to his exemption, although the land is subject to a mortgage wherein the homestead is waived. *In re Poleman*, 9 B. R. 376; s. c. 5 Biss. 526; *in re Jones*, 2 Dillon, 243; *Rix v. Capitol Bank*, 2 Dillon, 367.

If the homestead is subject to a mortgage, the amount will be allowed out of the equity of redemption. In *re* *Poleman*, 9 B. R. 376; s. c. 5 Biss. 526; in *re* *Charles C. Pratt*, 1 Cent. L. J. 290; s. c. 7 Pac. L. R. 202.

If personal property is covered by a mortgage, the assignee may sell it for the purpose of liquidating the mortgage, and the bankrupt may then, without a previous demand, claim his exemption out of the proceeds. In *re* *Henry May*, 2 C. L. B. 152.

No exemption can be allowed to a partner out of the firm property until all the partnership creditors are paid in full. In *re* *J. S. & J. Price*, 6 B. R. 400; in *re* *Handlin & Venny*, 12 B. R. 49; s. c. 3 Dillon, 290; in *re* *Blodgett & Sandford*, 10 B. R. 145; in *re* *D. H. Tonne*, 13 B. R. 170; in *re* *Stewart & Newton*, 13 B. R. 295; in *re* *Boothroyd & Gibbs*, 14 B. R. 223. Contra, in *re* *Rupp*, 4 B. R. 95; s. c. 2 L. T. B. 123; in *re* *Young et al.*, 3 B. R. 440; in *re* *McKercher & Pettigrew*, 8 B. R. 409; in *re* *S. H. Richardson & Co.*, 11 B. R. 114; s. c. 7 C. L. N. 62.

If an insolvent firm transfer a note to one partner, who purchases land therewith, he can not claim that as a homestead. In *re* *Boothroyd & Gibbs*, 14 B. R. 223.

One of two or more partners can not have a portion of the partnership effects set apart to him as his personal property exemption without the consent of the other partner or partners, because the property is not his. But if the other partner or partners consent, then it may be done. The creditors of the firm can not object, because they no more have a lien upon the partnership effects for their debts than creditors of an individual have upon his effects. *Burns v. Harris*, 67 N. C. 140.

A partner may claim a homestead where the house was built on the land of such partner with partnership funds, with the knowledge and consent of his copartner, but not in excess of the debt due by the firm to him. The house became a part of the realty, and as much the separate property of the partner as the realty itself. No reimbursement can be claimed by the copartner on account of such use of the firm funds, because the firm owed the partner more than the amount of the funds so used. The firm, therefore, has not only no interest or ownership in the house, but no claim for reimbursement. In *re* *J. F. & C. R. Parks*, 9 B. R. 270.

The ownership will be deemed to be in severalty, although the title bond is taken to the firm, if the partners have divided the land and entered into an agreement that each shall hold his part in severalty. *Bartholomew v. West*, 8 B. R. 12; s. c. 2 Dillon, 290.

Where the State laws exempt a certain amount of property, real or personal, and the bankrupt has nothing but claims against other parties, he can not have an allowance of money equal to the amount exempted under the State laws. In *re* *Lawson*, 2 B. R. 54.

Expectant interests which can not be sold, even though they may be reached by proper process in the State court, may be exempt. In *re* *Erben*, 2 B. R. 181; s. c. 8 A. L. Reg. 34; in *re* *Bennett*, 2 B. R. 181; s. c. 8 A. L. Reg. 34; 25 Pitts. L. J. 316.

Where, by the State law, real estate to a certain amount is exempted from levy and sale, provided the debtor comply with certain requirements,

and the bankrupt has failed to comply, no property can be claimed as exempted under that law. In *re Farish*, 2 B. R. 168; in *re Jackson & Pearce*, 2 B. R. 508; in *re Gainey*, 2 B. R. 525.

A law which exempts property from debts existing at the time when the homestead is set apart is unconstitutional and void, as it impairs the obligation of contracts. *Kelly v. Strange*, 3 B. R. 8.

A homestead law is unconstitutional so far as it affects debts contracted after its adoption. In *re Henkel*, 2 B. R. 546; 2 Saw. 305.

If a decree for alimony is a lien on land, the exemption will be made subject to the wife's right of alimony. In *re Edward Garrett*, 11 B. R. 493.

But property mortgaged to secure a loan before the passage of the State exemption law may be exempted, even though the mortgage debt is not paid. This right is given to the bankrupt by the bankruptcy act. In *re Jas. B. Brown*, 3 B. R. 250; s. c. 2 L. T. B. 122; s. c. 1 C. L. N. 409.

The exemption is a fixed and determinate right, and not dependent upon the discretion of the assignee or the court. When the claim is made by the bankrupt before sale, though not recognized by the assignee, the right may be asserted against the proceeds in court for distribution. In *re Jones*, 2 Dillon, 243.

If the bankrupt selects money or personal property for his homestead, he must indicate the mode in which it shall be preserved or invested for the use of himself or family, as a homestead provision, subject to the limitations of the State law. In *re Kean et al.*, 8 B. R. 367.

The object of a homestead exemption law is as much to protect the wife and children as the husband. Mere absconding will not give rise to a presumption of a fixed intention not to return. While the family remain in the State, occupying the premises as a home, the exemption is secured, inasmuch as it continues to be owned and occupied by the bankrupt while his family resides upon it. Their occupancy is his occupancy. His residence is where his family reside. In *re Charles C. Pratt*, 1 Cent. L. J. 290; s. c. 7 Pac. L. R. 202.

As the title to the homestead does not pass to the assignee, a subsequent abandonment of it by the bankrupt gives no right to the assignee. *Rix v. Capitol Bank*, 2 Dillon, 367.

The proof of an intention to abandon the homestead should be clear and decisive. *Ibid.*

If a judgment is docketed before the execution of a general deed of trust to secure all creditors, the judgment, with its priority, remains intact, and no exemption can be allowed unless there is a surplus after paying all the debts. In *re W. S. Coons*, 5 C. L. N. 515.

If a judgment is subject to an exemption, the exemption can be claimed against a *fi. fa.*, for it is an emanation from the judgment, and its lien falls with the lien of the judgment. In *re Anon.*, 5 C. L. N. 515.

If the bankrupt sells his homestead and moves into his store, under a scheme to defraud his creditors, he can not claim the latter as a homestead, for he has no right to shift his homestead to the prejudice of his creditors and in violation of the principles of fair dealing. In *re Geo. O. Wright*, 8 B. R. 430; s. c. 3 Biss. 359.

Although a bankrupt upon becoming insolvent moves into a block erected for business purposes and not in any manner constructed so as to have the appearance or character of a dwelling-house, yet he can not claim it as exempt under the laws of Wisconsin. *In re Lammer*, 14 B. R. 460; s. c. 8 C. L. N. 386; s. c. 3 Cent. L. J. 574.

A bankrupt may enforce a trust deed assigned to him with his homestead and as a muniment of his title. *Holloman v. White*, 41 Tex. 52.

When stock out of the State is brought into the State and mixed with other goods without any fault of the bankrupt, the two should be taken as together constituting the stock in trade of the bankrupt. *In re Jones*, 2 Dillon, 243.

If a party who has executed a mortgage to secure future advances subsequently declares a homestead on the premises so mortgaged, and then obtains further advances without disclosing the fact that he has thus declared a homestead, the mortgagee will be protected for any advances made without notice of the declaration of a homestead. *In re Haake*, 7 B. R. 61; s. c. 2 Saw. 231.

Exemption laws founded on the humane policy of making provision for the support of the poor man and his family are to be liberally rather than strictly construed. They should receive such fair construction as will best promote the beneficent intention of the legislature. *In re Jones*, 2 Dillon, 243; *in re McKercher & Pettigrew*, 8 B. R. 409; *in re E. A. Vogler*, 8 B. R. 132.

If a debtor has two pairs of oxen in his possession, the title to one of which is to remain in the vendor until paid for, the other is his only pair of oxen, and is exempt under the laws of Vermont. *Wilkinson v. Wait*, 44 Vt. 508.

In Pennsylvania the right of exemption does not affect or impair the vendor's lien for the purchase money, and can not be set up against his judgment. *Fehley v. Barr*, 66 Penn. 196.

The constitution of Virginia took effect, so far as it relates to the provision for exemptions, on July 6, 1869. It follows that the exemption laws passed to give effect to that are to become operative from that date. *In re Daniel Deckert*, 10 B. R. 1; s. c. 1 A. L. T. (N. S.) 336; s. c. 6 C. L. N. 310; s. c. 9 A. L. J. 390.

The constitution of Virginia grants the exemption as a privilege to the householder. It declares that he shall be entitled to hold property to be selected by him. Whether he will make his claim or not is optional with him. He may, therefore, waive his right to the exemption. *In re Joseph Solomon*, 10 B. R. 9; s. c. 1 A. L. T. (N. S.) 351; s. c. 9 A. L. J. 391.

The act of Congress, passed June 25, 1868 (15 Stat. 73), approving of the constitution of the State of North Carolina, did not alter or affect the provision of this section in respect to exemptions. No amendment of the bankruptcy law was intended by the act of acceptance, nor did that act have that effect. *In re Archibald McLean*, 2 B. R. 567.

In North Carolina, the law of February, 1867, entitled "An act restoring to married women their common-law right of dower," declaring that the dower shall be laid off before any sale can be made on execution in the



lifetime of the husband, is only an effort to create a new and additional exemption, and to this extent is unconstitutional and void as to debts existing at the time of the passage of that law. The law of 1868 has the same purport, and must be similarly construed. *Kelly v. Strange*, 3 B. R. 8.

The vendor's lien was not preserved by the code which went into force in Georgia on the 1st of January, 1863. Courts will presume that the property which has been set apart to the bankrupt is property that was exempt, and that the bankruptcy court saw to it that all the requisites necessary to make its judgment binding were complied with. A judgment rendered upon a note for the purchase money, prior to the filing of the petition, can not be enforced against the land, and the fact that the creditor did not prove his claim is of no avail. *Rushin v. Gauze*, 41 Ga. 180.

Under the laws of Georgia, there is no property or right of property in the family until the homestead is laid off. The right of the wife and family to a homestead does not stand on the footing of an equitable title or lien, which follows the property into the hands of a purchaser with notice. It is a right which depends for its existence upon the judgment of a court. If the husband is declared a bankrupt before a homestead is set apart, the right of the wife and family is a matter for the adjudication of the bankruptcy court, and the State courts have no jurisdiction over the same. The true course for them to pursue is to present their claims to the bankruptcy court, not as an exemption of the husband's property, but as a claim of their own. *Woolfolk v. Murray*, 10 B. R. 540; s. c. 44 Ga. 133; *Lumpkin v. Eason*, 10 B. R. 549; s. c. 44 Ga. 339.

Under the laws of Georgia, real estate mortgaged by the vendee, at the time of the purchase, to the vendor, to secure the payment of the purchase money, can not be claimed as exempt from the claim of the mortgagee until the mortgage debt is paid; such property can not be exempted. *In re Whitehead*, 2 B. R. 599.

Under the laws of Georgia, to constitute a head of a family it is not necessary that a man shall have either a wife or a child. If he resides in a house of which he is proprietor, and has no other inmates than hired servants, he is in law the head of a family. When the bankrupt rents a house, hires servants, and allows an adopted daughter and her children to live with him, he is entitled to the exemption allowed to the head of a family, but he is not entitled to any enlargement of his exemption on account of the children. *In re Wm. Taylor*, 3 B. R. 158.

Under the constitution of Florida, the bankrupt's shop, store, mill or farm, where he pursues his usual trade or avocation, if connected with and adjacent to his dwelling is included in his homestead. *Greely v. Scott*, 12 B. R. 248; s. c. 2 Woods, 657.

Under the laws of Kentucky, a homestead can not be acquired by a mere naked intention. The present purpose to erect at a future time a dwelling-house on land and to occupy it as a home is not sufficient to constitute a homestead in it. There must be a dwelling-house on it which is occupied or has been occupied, and which has not been abandoned, or to which at least the bankrupt, if he has never occupied it, looks as his home. *In re Geo. T. Duerson*, 13 B. R. 183.

If a bankrupt under the laws of Texas acquires a right to a rural homestead, the subsequent extension of the limits of a city so as to embrace a part thereof does not affect his right. *In re W. C. Young*, 15 B. R. 205.

Under the State law in Texas, an unmarried man who keep a house, and has orphan children apprenticed to him, is not entitled to the homestead allotted to a family. He is entitled to fifty acres under the act of 1839. *In re Summers*, 3 B. R. 84.

Under the laws of Texas, a homestead can not be claimed by the bankrupt to the prejudice of a vendor's lien thereon. *In re Hutto*, 3 B. R. 787; s. c. 1 L. T. B. 226; 3 L. T. B. 197.

Under the laws of California, a homestead may be declared at any time before the lien of a judgment has actually attached to the land. *In re Henkel*, 2 B. R. 546; s. c. 2 Saw. 305.

A person indebted, or even insolvent, may apply his property to the acquisition of a homestead, or the discharge of incumbrances thereon, without depriving it of the exemption from forced sale by law. *In re Henkel*, 2 B. R. 546; s. c. 2 Saw. 305. *Contra*, in *re Boothroyd & Gibbs*, 14 B. R. 223.

If the bankrupt has placed a mortgage on his homestead to the amount of the full value thereof, the bankrupt under the laws of Ohio is entitled to an exemption of \$500 out of the personal property. *In re Henry May*, 2 C. L. B. 152.

Under the laws of Ohio, providing that a certain amount of real estate used as a homestead, shall be exempt from sale on execution, the debtor does not acquire in the homestead so set off to him a fee-simple absolute title, but he possesses only a qualified right, a right to possess and occupy it so long as he uses it as a homestead for his family, and otherwise complies with the requirements of the law. The remainder or reversion in such property, after that right is ended, belongs to his creditors, and passes by the assignment to the assignee, who may sell the same. *In re John Watson*, 2 B. R. 570; s. c. 2 L. T. B. 93.

Under the laws of Indiana, a bankrupt is not entitled to an exemption as against a judgment for damages and costs in an action of replevin. *In re John Owens*, 12 B. R. 518; s. c. 6 Biss. 432.

In Missouri, a bankrupt is entitled to have a homestead set apart in the leasehold estate owned by him at the time he was declared bankrupt, if he is the head of a family. *In re Beckerkorb*, 4 B. R. 203; s. c. 1 Dillon. 45; s. c. 1 L. T. B. 241.

It is lawful and proper when there is no individual ownership by the head of a family of the property referred to in section 11, chapter 63, of the Revised Statutes of Missouri, to make the allowance out of partnership assets, even though they are not sufficient to pay all the partnership debts. It is true that there can be no individual interest of a partner in partnership property until partnership debts are paid, yet his right of exemption in his individual property disregards the otherwise legal rights of his creditors. *In re Young et al.*, 3 B. R. 440.

In Kansas a merchant is not entitled to an exemption of \$400 out of his stock in trade. *In re Schwartz*, 4 B. R. 588.

A merchant tailor who does not sell goods as merchants usually do, but

manufactures them for customers upon special orders under his own superintendence, is entitled to the exemption of \$400, under the laws of Kansas. The fact that he did not do all the work himself, but employed workmen, makes no difference. *In re Jones*, 2 Dillon, 243.

Under the laws of Kansas, the whole house occupied by the bankrupt as a home is exempt, though a portion of it may be used and may have been constructed with a view to be used for other purposes. *In re Tertelling*, 2 Dillon, 339.

In order to come within the provisions of the homestead laws of Michigan, the dwelling-house must be owned by the occupant, as well as the land upon which it is located. *In re J. F. & C. R. Parks*, 9 B. R. 270.

Under the laws of Nebraska, it is not necessary that the ownership of the land must be of the full legal title. It is sufficient that the interest be such as may be sold on execution or subjected to the payment of debts. A title bond makes the holder the owner in such a sense as to entitle him to the benefit of the homestead exemption. *Bartholomew v. West*, 8 B. R. 12; s. c. 2 Dillon, 290.

**Practice in Making Exemptions, and Exceptions Thereto.**—The register does not hold a court auxiliary to the district court. His duties are purely ministerial, and he can not pass upon questions of fact, except when a special case is referred to him. He has nothing to do with the report of exemption, unless it is referred to him, and certainly has no authority to take testimony, and thereupon determine its correctness. The report must be filed in court, and the court can not recognize a deposit of it with the register. It is the groundwork for movements in court, and is the basis of a contest in which the court may call a jury for its aid in reviewing the discretion and judgment exercised by the assignee in setting aside and issuing his certificate for property claimed to be exempt under State laws, or otherwise. If the court does not have upon its files a report, duly and properly returned according to law, all proceedings resting thereon are irregular. *In re Cordes*, 1 Pac. L. R. 165.

Where a doubt exists as to whether the bankrupt has made full disclosures of all his property in his schedules, he is not entitled to his exemption until after his last examination. *In re Mastbaum*, 2 W. N. 479.

A proper and reasonable construction of the rule requiring the assignee to make a report of the exempted property within twenty days after receiving the assignment, demands that, where the property to be exempted is in litigation, the time shall be computed from the date of the final decision of the court, so as to give twenty days after the property is adjudged to be within or under the control of the assignee. *In re D. Shields*, 1 B. R. 344.

In the list of exceptions the value of the articles set apart should be stated, so that it may be seen whether they come within the limitations of the act. *In re Graham*, 2 Bliss, 449.

The provisions of Rule XIX, requiring the assignee to report to the court the "articles set off to the bankrupt under the fourteenth section of the act, with the estimated value of each article," evidently refers to the "necessary household and kitchen furniture, and other articles and

necessaries not exceeding \$500 in value," which the assignee is by that section required to designate and set apart, and not to real estate held as a homestead. A homestead is not a necessary article to be set off by the assignee. In *re C. Hunt*, 5 B. R. 493; s. c. 2 L. T. B. 197; s. c. 4 C. L. N. 5; s. c. 2 Pac. L. R. 146.

The auxiliary "may," in Rule XIX, allowing creditors to file exceptions, is not to be taken in an imperative sense. The supreme court intended to leave a discretion with the circuit and district court, to permit them to repair accidents, correct mistakes, and prevent frauds. In *re Perdue*, 2 B. R. 183; s. c. 2 W. J. 279.

Where an attempt is made to exempt a species of property that can not be exempted, it is not necessary in order to defeat the exemption, to file exceptions within the required time. No exceptions need be taken. The title to property so attempted to be exempted, passes to the assignee, and remains in him until it is divested in some one of the ways provided by the law. The attempt to exempt is ineffectual. The creditors may except to the account of the assignee, if he omits to account for or charge himself with the value of such property. In *re Gainey*, 2 B. R. 525; in *re Jackson & Pearce*, 2 B. R. 508; in *re Farish*, 2 B. R. 168.

Where the exceptions are as to articles comprehended by the terms "household or kitchen furniture, or other articles or necessities," they must be made in the way, and also in the time, prescribed. In *re Gainey*, 2 B. R. 525.

Where the exceptions go to the title to the exempted property, they need not be filed within the required time. In *re Perdue*, 2 B. R. 183; s. c. 2 W. J. 279.

Quære, Should the assignee give notice to the creditors that he has filed his report of articles set apart for the bankrupt? *Ibid*.

The assignee is not obliged to designate articles on which there is no lien. If he were, the bankrupt might have nothing exempted. The assignee, moreover, is not a judicial officer to determine the question of lien or no lien. If the assignee should make such a designation of exempted articles as would by reason of the incumbrances on those articles, be worthless or insufficient to fulfill the beneficent design of the law in making exemptions, the bankrupt could obtain redress by excepting to the determination of the assignee. His appeal from the assignee to the court would bring before the court the whole question of the existence and amount of the liens. In *re C. H. Preston*, 6 B. R. 545.

Where the exemption under the State law is absolute, it is not necessary in order to preserve the exemption that the bankrupt shall apply to the assignee to have the property selected and set apart as a homestead. *Rix v. Capitol Bank*, 2 Dillon, 367.

The decision of the assignee can only be reversed on an exception to it. This need not be done in the shape of a formal bill of exceptions. In *re Richard Prior*, 4 Biss. 262; in *re W. H. Thiell*, 4 Biss. 241.

The court will deem the allowance made by the assignee to be reasonable and suitable until the contrary is shown by some appropriate facts and proofs. In *re Ziba Williams*, 5 Law Rep. 155.

The court will not reverse the decision of the assignee, unless it plainly appears that he has abused the discretionary power confided to him. In re W. H. Thiell, 4 Biss. 241.

ACT OF 1898, CH. 7, § 70. **Title to Property.**—(a) The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

(b) All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

(c) The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

(d) Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

(e) The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value.

(f) Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him.

ACT OF 1867, § 5046. All the property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent rights and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication in bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee.

Statute revised - March 2, 1867, ch. 176, § 14, 14 Stat. 522. Prior Statutes - April 4, 1800, ch. 19, §§ 13, 17, 20, 44, 2 Stat. 25, 26, 27, 33; Aug. 19, 1841, ch. 9, § 3, 5 Stat. 442.

Such powers did not pass by law of 1867. *Jones v. Clifton*, 18 B. R. 125.

Power given to cestuis que trustent, in deed of trust to secure a debt, to appoint a new trustee on failure of original trustee to act, is a personal trust or confidence in cestuis que trustent, and will not pass to their assignee in bankruptcy. *Clark et al. v. Wilson et al.*, 16 B. R. 356.

Judgment in personam can not be taken against the wife of a bankrupt, or her executors, for the value of real or personal property conveyed to her in fraud of creditor. *Phipps v. Sedgwick*, 16 B. R. 64.

A bankrupt at time when free from debt, and without contemplation of bankruptcy, conveyed to his wife, without intervention of a trustee, certain lands to her separate use, reserving the power of revocation and appointment to any such uses or person as he might designate. Held, that the settlement would be upheld against assignee in bankruptcy. *Jones v. Clifton*, 18 B. R. 125.

Omission to insert power of revocation in a voluntary settlement will subject the settlement to more or less suspicion. *Ibid.*

A court of equity should and will protect a wife so long as she is in actual enjoyment of any substantial benefit conferred on her by a settlement, though it contain reservation tending to impair to full benefit of the provisions made for her, it having been made by the husband, when free from debt, and induced by no fraudulent motive. *Ibid.*

Where a debtor, while insolvent, invested his means in the purchase of property, taking conveyance in name of his wife, and was afterward adjudicated bankrupt; Held, that the State court had no jurisdiction of a suit brought by a creditor to set aside such conveyance and appropriate the proceeds to payment of his debt. Such rights and interests vest in the assignee in bankruptcy, and he is a necessary party to the suit. *Winters v. Claitor*, 18 B. R. 533.

An assignment for the benefit of all the bankrupt's creditors is not void at common law, but is only void, under the bankruptcy law, as against the assignee, and no lien exists in favor of a judgment creditor whose judgment was entered and enrolled against the bankrupt after such an assignment. *In re John C. Walker*, 18 B. R. 56.

The trustee was subsequently chosen assignee in bankruptcy. Held, that the title became vested in him from the date of the assignment, and this being so all his acts as trustee performed in accordance with the deed of assignment, intermediate its date and the bankruptcy, must be approved. *Ibid.*

Interest in lands acquired at administrator's sale, where administrator has not made title, is assignable. *In re Wm. P. Reynolds*, 16 B. R. 158.

Such equitable interest is liable to liens of judgment creditors, subject to equities of a surety of debtor who holds a prior assignment as indemnity for his liability. *Ibid.*

A claim in favor of bankrupt against the government will pass to his assignee. In this case a claim for burning cotton in enemy's country, during the war, against the officers who destroyed same, is held to be substantially a claim against the government. *Phelps v. McDonald*, 16 B. R. 217.

In Indiana, a conveyance of real estate to husband and wife creates an estate in joint tenancy, and in such an estate neither husband nor wife has any interest subject to execution or that will pass to assignee of either. Effect of a divorce subsequent to adjudication in bankruptcy discussed. *In re Benson*, 16 B. R. 377.

One who holds a mortgage, valid as against the provisions of the bankruptcy law, with condition broken before commencement of proceedings, has a right, as against the assignee, to all the bark-wood and timber cut from the premises, whether on them or not. *In re Wm. Bruce*, 16 B. R. 318.

Where such mortgagee has given notice of his claim to the marshal when he seized the property, and to the assignee when he took possession of it, they are to be considered as taking it for him, and the expense of securing it should be borne by him. *Ibid.*

Bankrupt nearly a year before petition filed left a note, signed by a third person, with an attorney for collection, and afterward drew sev-

eral orders upon him payable out of the proceeds thereof. Held, holders of such orders were entitled to payment out of such proceeds in preference to the assignee. In re E. M. Smith, 16 B. R. 399.

Assignee takes the property of bankrupt as an attaching creditor would take it, subject to all claims upon it. *Safford v. Burgess*, 16 B. R. 402.

H., by will, devised his real estate to his three grandchildren and their heirs, the will providing that said real estate "shall not at any time hereafter be sold or alienated," but provided that the executors should rent same, and pay the rent to testator's heirs; also that "in case any of my said heirs and devisees shall die without lawful issue" the share of one so dying shall go to the grandchildren and the survivor of them, and to the heirs of such survivor forever. At the time of death of H., one of the grandchildren, W., was married and had seven children living. Held, that the remainder to issue of said grandchild was vested, and alienable, and would pass to a general assignee in bankruptcy during the life of the said W. *Smith v. Scholtz*, 17 B. R. 521.

The bankrupt, under contract with S. & Co., purchased hides, and manufactured leather for them, discounting drafts upon S. & Co., at bank, proceeds of drafts being placed to credit of bankrupt's general account, and the hides were paid for by checks upon such account. Held, the hides became the property of S. & Co.; that it is not necessary that an agent should pay out identical bank notes he receives from his principal. *Safford v. Burgess*, 16 B. R. 402.

Where some of the hides were purchased with proceeds of drafts which S. & Co. refused to accept, their title to same is not affected by such fact, but they become debtors to the estate, or to the bank advancing the money. *Ibid.*

The title to the leather, when completed, passes under the arrangement for the purchase of the hides. *Ibid.*

Arrangement between two banks, by which one is to act as agent of the other for clearing-house purposes, and the latter deposits funds to meet checks drawn upon it, creates relation of debtor and creditor, and such deposits upon failure of former bank will pass to its assignee. *Phelan, Assignee, v. Iron Mountain Bank*, 16 B. R. 308.

Where latter bank has knowledge of insolvency of former, a repayment of such deposits by former on day of its failure is a preference, and may be recovered by the assignee. *Ibid.*

A lease of property owned by the bankrupt, which is valid against him, although not recorded as required by the statute of the State, is valid against the assignee, although he had no knowledge of its existence. *Goss v. Coffin*, 17 B. R. 332.

Bankrupt payee of a negotiable bill or note, who before bankruptcy sells and delivers same without indorsement, may indorse same after adjudication, so that the holder may maintain an action thereon in his own name. *Hersey v. Elliott*, 18 B. R. 358.

Where income of trust moneys is to be paid to the bankrupt during his life, to be applied to the support of himself and wife and the education and support of their children, the trust declaring the principal and



income inalienable, the bankrupt takes it as a subtrustee, and is bound to apply it to the purposes named, and, therefore, it will not, upon his bankruptcy, pass to the assignee. *Durant, Assignee, v. Mass. Hospital Ins. Co.*, 16 B. R. 324.

The court can not apportion such income and give assignee an aliquot share. *Ibid.*

The firm of J. & S. was dissolved by mutual consent, and the firm property divided, each partner agreeing to pay the debts contracted in respect of the property received. S. sold an interest in the portion received by him to M., with whom he formed the new firm of S. & M., which incurred debts and became bankrupt. Before the adjudication, the property of the latter firm was attached by a creditor of the firm of J. & S. Held, that the property attached was property of the new firm; that the assignee was entitled to possession of it for the purpose of satisfying creditors of that firm, and that only the balance which might be due to S., after payment of the firm debts and adjustment of accounts, would be subject to the attachment. *Crane, Assignee, v. Morrison*, 17 B. R. 393.

B. and wife, for the purpose of securing money to pay off incumbrances on a farm, conveyed it to K., the wife's father, who delivered the money and executed an instrument which was a lease to B. and wife during lives of lessor and his wife, provided lessees should pay a stipulated annual sum. Then followed a conveyance to B. and wife, and the last clause directed redemption of the premises if the stipulations were faithfully fulfilled. The conveyance of the premises was in consideration of acquittance of all claims on K.'s estate by B. and wife. B.'s wife died in 1867, and K. and his wife died in 1874. The annual sum was paid up to 1867. B. afterward became bankrupt. Action was brought by his assignee to determine what rights he had in the farm. Held, B. and wife took it as joint tenants, and upon death of his wife B. took the whole; that the intention to have the estate holden for the fulfillment of the condition is plain; that assignee is entitled to the farm, subject to lien in favor of K.'s administrators for amount of annual payments due at K.'s death, with interest from the time they should have been paid. *Atwood, Assignee, v. Kittell*, 17 B. R. 406.

Sheriff held liable in damages to assignee in bankruptcy, and was guilty of conversion in selling goods seized by him under warrant of attachment, and sold under order of State court as perishable, after filing of an involuntary petition, but before adjudication, though the sheriff had no notice of the bankruptcy proceeding. *Long, Assignee, v. Conner, Sheriff*, 17 B. R. 540.

Sheriff is liable for true market value of the property on the day of the sale, and not merely for the amount realized at the sale. *Ibid.*

The market value of the property, rather than any injury over and above the market value which the assignee or the original owner might have suffered, is the measure of damages. *Ibid.*

For proper evidence in determining market value, see this case. *Ibid.*

The fact that the assignee in bankruptcy has already obtained judgment against the attachment creditor in a suit for damages for the same con-

version, and has issued execution, is no defense to a suit against the sheriff — the judgment being still unsatisfied. An unsatisfied judgment against one of two joint tort-feasors is no bar to an action against the other. *Ibid.*

An arrangement was entered into between defendant and a committee appointed by the bankrupt corporation, defendant, and other owners, by which defendant was to furnish the lumber necessary to rebuild a dam owned by them all. Defendant furnished a part of the lumber, placing it where it would be taken for use on his own land, but the dam was not rebuilt. Defendant proved his claim in bankruptcy for the bankrupt's share of the purchase price, but afterward withdrew it, and neither the bankrupt nor its assignee ever paid anything for the lumber thus furnished, or otherwise took possession of it. Subsequently defendant obtained leave of the assignee to sell it, and promised thereupon to pay him his share of the avails; but after selling some he refused, on demand, to pay over plaintiff's share. In an action by the assignee to recover such share as money had and received to his use, Held, that it was proper to submit to the jury the question whether anything remained to be done to the lumber by defendant before, under the contract, it was to be taken and used; that the question whether the title to the lumber passed to the bankrupt, and, therefore, whether there was a consideration for defendant's promise, depended upon whether anything remained to be done by the seller. *Gates v. The Winooski Lumber Co.*, 18 B. R. 31.

Bankrupts having made default in payment of a chattel mortgage, the mortgagees, pursuant to the terms thereof, took possession of the mortgaged property. Before the sale a creditor issued execution to the sheriff. One hour thereafter the petition was filed. Held, that at the time the execution was issued the bankrupt had no leviable interest in the property, and that the creditor had no lien on the surplus to exclusion of assignee. *In re Wrisley*, 17 B. R. 259.

Bankrupt had obtained a large sum of money through appellant's firm, who were insurance agents, and left a portion thereof in their hands to be applied as premiums upon policies which he agreed to furnish in the companies represented by them, as a mode of compensation for their services. One-half of the amount in hands of appellant was applied in payment of premium upon a policy procured by the bankrupt on his own life. No other risks were furnished. In an action by assignee in bankruptcy against appellant to recover balance of amount so left, Held, that the firm had a vested interest in the money, and the assignee was not entitled to recover. *Newcomb v. Launtz*, 18 B. R. 276.

Where one party agrees to furnish goods to another at a fixed price, the latter to pay freight, storage and charges, and pay at the end of every three months for the goods sold by him within that time, and pay at the end of the year for all goods remaining unsold, the proceeds of the goods sold by latter can not be recovered from his assignee in bankruptcy. Such arrangement does not create relation of principal and agent, but that of buyer and seller. *In re Linforth, Kellogg & Co.*, 16 B. R. 435.

Right of action to recover usurious interest passes to assignee. *Wheelock, Assignee, v. Lee*, 17 B. R. 563; *Wright v. Nat. Bk.*, 18 B. R. 87.

The assignee, however, can not maintain an action to compel return of collaterals given by the bankrupt, as security for usurious loan, until he has paid, or offered to pay, the sum loaned. He is not a borrower within meaning of the statute. *Wheelock, Assignee, v. Lee*, 17 B. R. 563.

Where cause of action pending at time of adjudication is one which passes to the assignee, he should be notified, and in case of his refusal the action must be dismissed. An order that a nonsuit be entered if assignee did not appear within a specified time held erroneous. *Towle v. Davenport*, 16 B. R. 478.

A bankrupt may continue to prosecute an action pending at time of adjudication, where the cause of action is one that does not pass to the assignee. *Ibid.*

Where before commencement of bankruptcy proceedings the holder of a chattel mortgage executed by the bankrupt took possession of the mortgaged property and appropriated it to his own use, the assignee could not maintain an action of trover to recover the value of same. *Jones v. Miller, Assignee*, 17 B. R. 316.

Assignee can not maintain a suit in equity to obtain possession of property alleged to belong to the estate. Remedy is at law. *In re The Oregon Iron Works*, 17 B. R. 404.

In an action brought by an assignee of a corporation to enforce the subscription of defendant to an increased capital stock of a reorganized corporation of which he had acted as an officer, the defendant could not deny the regularity of the organization of the new company. *Chubb v. Upton, Assignee*, 16 B. R. 537.

In a suit brought against a party who appears upon the books of the corporation as a stockholder, to recover amount of an assessment upon stock apparently held by him, the burden of proof is upon defendant to show that he is not a stockholder. *Turnbull, Jr., v. Payson, Assignee*, 16 B. R. 440.

In the ordinary case of a solvent private corporation there is no liability of the stockholders to pay the capital until an assessment; but in the case of insolvency payment is compellable at the suit of the creditors, though no assessment may have been made. *Wilbur v. Stockholders of Corporation*, 18 B. R. 179.

Under proceedings in equity for this purpose the court may, if sufficient corporate organization continues to subsist, order an assessment by the corporate authorities upon the stockholders in any stage of the proceedings for any purpose for which it may be thought convenient. *Ibid.*

The bankrupt was a company organized under special act, with a capital of \$50,000, divided into 1,000 shares, with power to increase the number of shares to 3,000. It gave no authority to the directors, or to any officer, to accept payment for the stock except in money or money's worth. By the articles of association it was provided that the subscribers should give their notes without interest for the amount subscribed by them respectively, which notes should not be liable at any time

to an assessment of more than fifty per cent. of their face, nor to any assessment of more than twenty per cent., within eighteen months from the organization of the company. Held, that the meaning of the provision was that, with ultimate relation to creditors, capital was of the full residuary amount, but such calls for payment on the stock as might from time to time be made by the corporate authorities during the course of the active business of the company as a solvent concern should not exceed one-half of that amount. There was nothing, therefore, in the articles of association to exempt or absolve stockholders from liability to creditors for so much of the whole subscribed capital as might be required for the payment of debts. *Ibid.*

Most of the stockholders gave such notes in payment for their stock, which contained the provisions of the articles of association, and also a provision that all dividends should be credited proportionately upon it until its full amount by reason of credits by assessments and dividends should be paid, and the same should be returned, and in lieu thereof a paid-up certificate of stock be issued. Held, that the operation of the articles of association as to creditors was not and could not be altered by the insertion of this provision. *Ibid.*

The company having become bankrupt, and the deficiency of other assets exceeding the whole amount of subscribed capital, Held, that the stockholders were liable to the assignee for their respective proportions of such unpaid amount. *Ibid.*

Stockholders of an insolvent corporation, who are also creditors, can not deduct the amount due to them from their respective proportions of the unpaid capital, but if they prove their debts deductions equal to their estimated respective dividends may perhaps be made from the amount of the assignee's demands against them as stockholders. *Ibid.*

Where an investment of stock by a corporation is ultra vires the corporation will not be held liable as a stockholder. *Ibid.*

A transferee of stock in a bankrupt company is liable to the assignee in respect to such stock; but where the transfer is not accepted by the transferee the transferer is alone liable. *Ibid.*

Where the issue of shares of capital stock in a corporation which is fraudulent in fact appears formal and regular on its face, and the books of the corporation show that the shares are fully paid up, and there is nothing to put an innocent purchaser of such shares in the open market upon inquiry, such purchaser can not be held liable, but the remedy of the corporation is against the guilty perpetrators of the fraud in their individual capacity. *Foreman v. Bigelow*, 18 B. R. 457.

Purchaser at sale takes estate subject to all equities against it, and it is immaterial whether he knows of them or not. *Steadman v. Taylor*, 17 B. R. 283.

Order of sale of bankrupt's property, which directs the assignee to sell the right, title, interest, etc., of the bankrupt, is sufficient; it need not direct sale of right, title, interest, etc., which the assignee acquired by the decree of bankruptcy. *Smith v. Scholtz*, 17 B. R. 521.

Assuming that sale of real estate by assignee is to be assimilated to a sale under decree in equity, silent as to the manner of sale, it can not be attacked collaterally and held absolutely void because not made in parcels. *Ibid.*

Assignee is not bound by a partition to which he was not a party, and is entitled, if he does not elect to affirm the partition, to sell the undivided interest of the bankrupt which had been vested in him before the partition, if at all. *Ibid.*

Under the law of 1867, it was held that where a composition, partly carried out, is set aside, and an assignee appointed, the order should be made without prejudice to the lawful acts done or titles acquired under and by virtue of such composition. *Ex parte Hamlin, In re Brodt*, 16 B. R. 320.

That creditors who have taken the composition should not be allowed to vote for assignee was also held in this case. *Ibid.*

In action by assignee to set aside a sale or transfer of goods, as having been made in violation of bankruptcy act, the declaration must set out the facts of the illegal transaction. *Hallack & Bro. v. Tritch*, 17 B. R. 293.

Bankrupt is not a necessary party to bill filed by assignee to set aside, as a fraud upon creditors, a conveyance of real and personal property. *Buffington v. Harvey*, 17 B. R. 474.

Assignee can not reclaim money deposited for a special purpose, in which the person holding the deposit has acquired a vested interest. *Newcomb v. Lountz*, 18 B. R. 276.

One S., a special partner in a firm whose nominal assets exceeded its liabilities by only two-ninths, made a settlement upon his wife of leasehold property and bonds to amount of \$100,000. About this time the firm dissolved, and S., and one of the members of the old firm, formed a new copartnership, furnishing no new capital and continuing the business as if the old firm still subsisted. Two years later the new firm failed, and was found to be hopelessly insolvent. It did not appear that the wife took any part in bringing about the settlement, or that there was any guilty knowledge on her part in the transaction. She died before the failure. Her executor having sold the leasehold property, payment for same being partly in cash and partly by mortgage, loaned the cash to a firm which afterward failed, and it was lost to the estate. In action of assignee of firm to reach the property settled upon the wife, and subject it to his administration. Held, that the settlement was invalid; that the assignee was entitled to the possession of the mortgage, but that there could be no money judgment against the estate for the balance of the proceeds of sale of the leasehold property. *U. S. Trust Co. v. Sedgwick*, 18 B. R. 340.

The estate of a bankrupt, after satisfying the valid claim against it, belongs to the bankrupt, and, therefore, a conveyance by him alleged to be fraudulent as against the creditors will not be set aside in a suit by

the assignee where it appears that there are no debts provable against the estate. *Nicholas v. Murray et al.*, 18 B. R. 469.

Where a pledge has been made in good faith and for a valuable consideration, the assignee can not disregard the contract and recover the property, and a refusal by pledgee to surrender the property to the assignee is not equivalent to a conversion. *Yeatman et al., Assignees, v. N. O. Sav. Bk.*, 17 B. R. 187.

Upon discharge of assignee, property remaining in his hands reverts to debtor without reassignment. *Dewey v. Moyer*, 16 B. R. 1.

The bankruptcy court, under its power to enforce compositions, has no jurisdiction to compel a voluntary assignee to whom debtor had assigned his property, before commencement of proceedings in bankruptcy, for benefit of creditors, to deliver the property to the debtor, no suit having been brought to set aside such assignment, and the assignee not being a party to the proceedings. In *re Waitzfelder et al.*, 18 B. R. 260.

Where property has, by order of bankruptcy court, been sold subject to a lien, the assignee's deed providing that such lien is to remain in full force, the purchaser is estopped to deny the validity of such lien. *Bucknam v. Dunn et al.*, 16 B. R. 470.

It was held, under the law of 1867, that the bankruptcy act had not entirely superseded the State insolvent laws, and where an insolvent debtor refuses to file a voluntary petition, and has committed no act of bankruptcy, and it does not appear that the requisite number of creditors are ready to join in a petition against him, compulsory proceedings by a creditor under the State insolvent law are not prohibited. *Geery's Appeal*, 17 B. R. 196.

**Choses in Action.**— The phrase "choses in action" is qualified and limited by the rest of the section. The choses in action for tort which pass to the assignee are rights of action for real or personal property, or for the unlawful taking or detention of property, or for injuries thereto, and not causes of action for merely personal injuries. *Noonan v. Orton*, 12 B. R. 405; s. c. 34 Wis. 259.

The words "choses in action" mean nothing more than the words "rights of action," and it has been uniformly held that these latter words only include rights of action founded on contracts or for injuries to property, and not rights of action for torts which are purely personal, and die with the party. *Dillard v. Collins*, 25 Gratt. 343.

The rights of action which pass to the assignee are those that are founded upon beneficial contracts made with the bankrupt where the pecuniary loss is the substantial and primary cause of action, and for injuries affecting his property, so far as they do not involve a claim for personal damages. *Ibid.*

An action for an abuse of an attachment or garnishee process is an action for a personal injury, and does not pass to the assignee, although the wrong injured the bankrupt's business. *Noonan v. Orton*, 12 B. R. 405; s. c. 34 Wis. 259.

A plea that the plaintiff has been adjudicated bankrupt is not a good plea to an action of slander. *Dillard v. Collins*, 25 Gratt. 343.

A right of action for damages arising from a fraudulent and deceitful recommendation of a person as worthy of trust and confidence, does not pass to the assignee. *Crockett v. Jewett*, 2 B. R. 208; s. c. 2 Ben. 514; s. c. 2 L. T. B. 21.

**Fraudulent Conveyances.**—The provisions of this clause relate to the State statutes against fraudulent conveyances, and to those only; and the right of action is not affected by section 5128. Section 5128 has no reference to those statutes, but is only intended to reach frauds on the bankruptcy act. *Bradshaw v. Klein et al.*, 1 B. R. 542; s. c. 2 Biss. 20; s. c. 1 L. T. B. 72; *Knowlton v. Moseley*, 105 Mass. 136; *Allen v. Montgomery*, 10 B. R. 503; s. c. 48 Miss. 101; *Hyde v. Sontag*, 8 B. R. 225; s. c. 1 Saw. 249.

Property received by a creditor in fraud of a compromise agreement vests in the assignee of the debtor under this clause. *Amsinck v. Bean*, 8 B. R. 228; s. c. 11 B. R. 495; s. c. 10 Blatch. 361; s. c. 22 Wall. 395.

The assignee represents the rights of creditors, as well as the rights of the bankrupt, and any lien or incumbrance which would be void for fraud as against creditors if no petition had been filed, or assignee appointed, will be equally void as against the general creditors represented by the assignee. He may contest the validity of a conveyance, even though the bankrupt could not. That is what the act means when it vests in the assignee all property conveyed in fraud of creditors. It does not make any conveyance or incumbrance fraudulent. It simply clothes the assignee with the entire title, notwithstanding such conveyance or incumbrance, and makes it his duty to invoke the proper jurisdiction to annul the fraudulent proceedings. *In re Wynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116; *Bradshaw v. Klein et al.*, 1 B. R. 542; s. c. 2 Biss. 20; s. c. 1 L. T. B. 72; *in re Metzger*, 2 B. R. 355; *in re Louis Meyers*, 1 B. R. 581; s. c. 2 Ben. 424; *Boone v. Hall*, 7 Bush, 66; *Pratt v. Curtis*, 6 B. R. 139; *Carr v. Gale*, 3 W. & M. 38; s. c. 2 Ware, 330; *Carr v. Hilton*, 1 Curt. 230; *Ashley v. Robinson*, 29 Ala. 112. *Vide Reavis v. Garner*, 12 Ala. 661; *Porter v. Douglass*, 27 Miss. 379.

A creditor who has instituted an action to set aside a fraudulent conveyance, may prosecute it after the commencement of proceedings in bankruptcy. *Phelps v. Curtis*, 16 B. R. 85.

If an insolvent husband purchases property in the name of his wife, the assignee can not abandon the pursuit of the property, and seek a judgment against her in personam. *Phlipps v. Sedgwick*, 16 B. R. 64.

Conveyances made with a specific intent to defraud creditors, and conveyances in fraud of creditors, in the technical and legal sense of the term, are both within the letter and spirit of the bankruptcy act. All conveyances made void as against creditors by the statute of frauds, in legal contemplation, are made in fraud of such creditors, whether they are fraudulent in fact by specific intent or only fraudulent in law. *Edmonson v. Hyde*, 7 B. R. 1; s. c. 2 Saw. 205; s. c. 5 L. T. B. 380; *Allen v. Massey*, 4 B. R. 248; s. c. 7 B. R. 401; s. c. 17 Wall. 351; s. c. 2 Abb. O. C. 60; s. c. 1 Dillon, 40; s. c. 1 L. T. B. 218; *in re Geo. P. Morrill*, 8 B. R. 117; s. c. 2 Saw. 356.

The declaration of a homestead is in no sense a conveyance. He who declares land which he already owns to be a homestead, does not convey it. He merely avails himself of a legal right to place it in a condition where it will not be liable to a forced sale. The right of property remains unchanged, except that the law, mindful of the object for which homesteads are allowed to be declared, provides that after the declaration the homestead can not be alienated except with the concurrence of the wife, and that on the death of the husband it survives to her for the benefit of herself and the family. It is evident that to call the declaration of a homestead a conveyance of the property would be doing extreme violence to the language of the act, and in view of the provisions allowing exemptions, such construction is inadmissible. *In re Henkel*, 2 B. R. 546; s. c. 2 Saw. 305.

An assignee may maintain an action to set aside fraudulent conveyances made by the debtor before he was adjudged a bankrupt, and even before the bankruptcy act was passed. *Bradshaw v. Klein*, 1 B. R. 542; s. c. 2 Biss. 20; s. c. 1 L. T. B. 72.

After the commencement of proceedings in bankruptcy, no one but the assignee can bring or maintain an action to set aside a fraudulent conveyance made by the bankrupt. *In re Louis Meyers*, 1 B. R. 581; s. c. 2 Ben. 424; *Stewart v. Isidor*, 1 B. R. 485; s. c. 5 Abb. Pr. (N. S.) 68; *Goodwin v. Sharkey*, 3 B. R. 558; s. c. 5 Abb. Pr. (N. S.) 64; *Allen v. Montgomery*, 10 B. R. 503; s. c. 48 Miss. 101; *Edwards v. Coleman*, 2 Bibb, 204; *Thurmond v. Andrews*, 13 B. R. 157; s. c. 10 Bush. 400.

The assignee may avoid a fraudulent conveyance, although he has no lien on the property. *Cragin v. Carmichael*, 11 B. R. 511; s. c. 2 Dillon, 519; *in re Wm. B. Duncan*, 14 B. R. 18.

If the fraud was merely constructive, and not actual, the assignee can not recover in an action at law. *Badger v. Story*, 16 N. H. 168.

If the assignee refuses to institute proceedings to set aside a fraudulent conveyance, any creditor who has proved his debt has a right to apply to the court for an order directing proceedings for that purpose to be instituted, upon such terms as appear to be right. *Freeland v. Holloman*, 9 B. R. 331.

A creditor may file a bill in equity to vacate a fraudulent conveyance, and make the assignee a party defendant. *Freeland v. Holloman*, 9 B. R. 331; *Allen v. Montgomery*, 10 B. R. 503; s. c. 48 Miss. 101; *Sands v. Codwise*, 4 Johns. 536.

A creditor can not file a bill in a State court to set aside a fraudulent conveyance without making the assignee a party. *Alsabrook v. Cates*, 5 Tenn. 271.

If a creditor, who does not prove his debt, holds a judgment which is a lien on property fraudulently transferred by the bankrupt, he may issue a fi. fa. and levy thereon even after the commencement of the proceedings in bankruptcy, if the assignee has taken no steps to reach the property. *Barber v. Terrell*, 54 Ga. 116.

The right of creditors to institute a suit to set aside a fraudulent conveyance is perfect upon the refusal of the assignee to permit the use of his



name, and can not be divested after the institution of the suit by any change of the assignee, for the latter merely comes into the place of the former and acquires no greater rights than he had. If the case has been carried to an appellate court, the proceedings will not be stayed until such assignee is made a party. *Sands v. Codwise*, 2 Johns. 485.

The creditors, as beneficiaries, are proper, though not necessary, parties. *Boone v. Hall*, 7 Bush, 68.

When a creditor has acquired a lien by virtue of proceedings instituted prior to the commencement of proceedings in bankruptcy to set aside a fraudulent conveyance of a bankrupt, he may continue the suit so as to enforce his lien. *Sedgwick v. Minck*, 1 B. R. 675; s. c. 6 Blatch. 156; *Stewart v. Isidor*, 1 B. R. 485; s. c. 5 Abb. Pr. (N. S.) 68; *Carr v. Fearington*, 63 N. C. 580; *Wooten v. Clark*, 23 Miss. 75; *Fetter v. Clode*, 4 B. Mon. 482; *Storm v. Waddell*, 2 Sandf. Ch. 494. Contra, *Smith v. Gordon*, 2 N. Y. Leg. Obs. 325; s. c. 6 Law Rep. 313.

A petition to set aside a deed of trust not contrary to other provisions of the bankruptcy act should allege that the property was conveyed by the bankrupt in fraud of his creditors, and show that the same passed to the assignee, under this section, as property conveyed by the bankrupt in fraud of his creditors. *In re Broome*, 3 B. R. 343; s. c. 3 Ben. 488.

Equity looks at substance and not form. It penetrates beyond externals to the substance of things, and it accounts as nothing and delights to brush away barricades of written articles and formal documents, when satisfied that they have been devised to conceal or protect fraud. If the fraud does not consist in a particular sale, but in the mode of conducting the business, it is a continuous fraud. *Martin v. Smith*, 4 B. R. 275; s. c. 1 Dillon, 85; s. c. 3 L. T. B. (C. R.) 199.

The statute of limitations of Missouri contemplates fraud which is secret or concealed, as distinguished from fraud which is open and known. If a party knows the facts constituting the fraud, he knows the transaction to be fraudulent. It is not enough simply that he is aware of the fact of the transfer, but he must know the facts which make that transfer fraudulent. If those facts are such that any creditor must, if ordinarily vigilant, have discovered the fraud within five years, the action will be barred. *Ibid*.

A mortgage upon a stock of goods which authorizes the mortgagor to sell them and replace them with others, at such time and in such manner as he may determine, and use the proceeds generally as he sees fit, is fraudulent and void. A mortgage accompanied by such an agreement, consent, or understanding is no protection to the mortgagee. Such an arrangement defeats its essential nature and qualities as a mortgage, so that it can not in a legal sense be called a security. It is nothing more than the expression of a confidence by the mortgagee in the mortgagor. If such an agreement is inserted in the mortgage, it is proven by the production of the mortgage, but if it is not, it may be proven by evidence aliunde. It is not necessary that it should be in writing or in the mortgage. It may be proven by parol, or inferred from circumstances and the conduct of the parties. *In re Kahley* et al., 4 B. R.

378; s. c. 2 Biss. 383; *Harvey v. Crane*, 5 B. R. 218; s. c. 2 Biss. 496; in re *Perrin & Hance*, 7 B. R. 283; in re *Samuel Cantrell*, 6 Ben. 482; *Smith v. McLean*, 10 B. R. 260; *Smith v. Ely*, 10 B. R. 553; *Robinson v. Elliott*, 11 B. R. 553; s. c. 22 Wall. 513; in re *Manly*, 3 B. R. 291; s. c. 2 Bond, 261; s. c. 2 L. T. B. 89. Contra, *Brett v. Carter*, 14 B. R. 301; *Barron v. Morris*, 14 B. R. 371; s. c. 2 Woods, 354; *Johnson v. Patterson*, 2 Woods, 443.

If the power to sell is not contained in the mortgage, its existence must be found by the jury before the mortgage can be declared fraudulent. *Miller v. Jones*, 15 B. R. 150.

A provision that a certain person shall take possession of the property as trustee under the mortgage and retain possession until the mortgage debt is paid will not render the mortgage valid, if the trusteeship is a mere pretense and the trustee merely sees that the business is regularly conducted. *Smith v. Ely*, 10 B. R. 553.

The taking of possession under a claim of title will not render the mortgage good, for the title still remains fraudulent. *Smith v. Ely*, 10 B. R. 553; *Robinson v. Elliott*, 11 B. R. 553; s. c. 22 Wall. 513; in re *William D. Forbes*, 5 Biss. 510.

A mortgage may be in operation as to a portion of the property, and fraudulent as to the residue. In re *Kahley*, 4 B. R. 378; s. c. 2 Biss. 383; in re *Perrin & Hance*, 7 B. R. 283; in re *Geo. P. Morrill*, 8 B. R. 117; s. c. 2 Saw. 356.

A mortgage containing a stipulation that the mortgagor shall remain in possession, and sell the mortgaged property as agent of the mortgagee, and account for the proceeds, until the mortgage debt is paid, is not necessarily void. If carried out in good faith, it does not hinder, delay, or defraud creditors. The object is to subject the mortgaged property to the payment of the loan. The mortgagor can only rightfully dispose of it for the purpose of liquidating the secured debt. He can not sell for his own use; this would be a fraud upon creditors, and if such permission were given by the terms of the instrument, or agreed and consented to by parol, the mortgage would be void. *Hawkins v. First National Bank of Hastings*, 2 B. R. 338; s. c. 1 Dillon. 462. Contra, in re *William D. Forbes*, 5 Biss. 510.

A mere power of sale will not vitiate a mortgage of personal property if it is provided that the proceeds shall be applied to purchase other goods as a substitute for those sold. *Mitchell v. Winslow*, 2 Story, 630.

When the State laws make all sales of chattels void unless accompanied by delivery within a reasonable time, and followed by an actual and continued change of possession, and there was no delivery or change of possession because the vendor and vendee lived together in the same house, the sale is void, and the assignee may recover the property so sold. *Allen v. Massey*, 4 B. R. 248; s. c. 7 B. R. 401; s. c. 1 Dillon, 40; s. c. 2 Abb. C. C. 69; s. c. 17 Wall. 351; s. c. 1 L. T. B. 218; *Edmonson v. Hyde*, 7 B. R. 1; s. c. 2 Saw. 205; s. c. 5 L. T. B. 380.

If the change of possession does not accompany the transfer, it is not sufficient that a change is made before a creditor acquires a lien on the goods. In re *Geo. P. Morrill*, 8 B. R. 117; s. c. 2 Saw. 356.

From *Twyne's*, down to the very latest case, no sale has ever been upheld by any court where the vendor has remained in possession, performing all the offices of an absolute owner, and continuing so for many months in every beneficial use and enjoyment which ordinarily appertain to the ownership of property. No state of facts can be made out of sufficient force to repel the inference of fraud. In *re Hussman*, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 O. L. N. 177; in *re Manly*, 3 B. R. 291; s. c. 2 Bond. 261; s. c. 2 L. T. B. 89; *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 O. L. N. 137.

The publicity attributed to an involuntary transfer of personal property under an execution fairly levied, prevents the application of the general rule, that continuance of possession by a debtor after a transfer of his property is a badge of such fraud as renders the transfer avoidable by his creditors, though it was a transfer for a valuable consideration. But the exception ceases as soon as the demands of the judgment creditors are paid. When these demands are paid the general rule becomes applicable. In *re Wm. H. Long*, 3 B. R. (quarto), 66.

If such change of possession is made as the nature of the subject admits of, nothing more is in general required. *Mitchell v. McKibbin*, 8 B. R. 548; s. c. 29 Leg. Int. 412.

The retention of the possession of fixtures after the execution of a mortgage is merely *prima facie* evidence of fraud. *Howard v. Prince*, 11 B. R. 322.

In Kentucky, an actual change of possession, so far as the thing sold is susceptible of it, is absolutely necessary to the validity of the sale, as to creditors and subsequent purchasers, whenever the vendor at the time of the sale is in possession of the property. And this transmutation of possession, to be effectual, must not be merely nominal or momentary, but must be real, actual and open, and such as may be publicly known. In *re Hussman*, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 O. L. N. 177.

An absolute deed intended as a mortgage is not conclusive evidence of fraud. *Gaffney v. Signalgo*, 1 Dillon, 158.

Where the State laws make the purchase of property in the name of another presumptively fraudulent as to existing creditors, and raise a trust in favor of such creditors when the presumption of fraud is not disproved, property so purchased passes to the assignee of the party whose money was so invested, and he can sue for and recover the same. In *re Louis Meyers*, 1 B. R. 581; s. c. 2 Ben. 424.

By the laws of Mississippi, the income of a wife's separate estate, so far as necessary, should be used jointly with that of her husband in support of the family. If she permits the husband to receive the income of her estate without accounting for the same for a longer period than one year, she loses the right to call him to an account for such income. The accounting for such income after the title has thus become vested in the husband, is a gift by the husband to the wife, and this can not be done to the prejudice of creditors. The relationship of the parties and the conveyance of all property that is subject to execution are evidence

of fraud. The rights of all parties must be governed by the law in force when they accrue. The act of 1867, entitled "An act to amend the law heretofore in force respecting the rights of married women," has no application to this case, having been passed subsequent to the conveyance. *Gillespie v. McKnight et al.*, 3 B. R. 468.

A condonation after a deed of separation renders the deed a voluntary conveyance instead of a conveyance for a valuable consideration. *Kehr v. Smith*, 7 B. R. 97; s. c. 10 B. R. 49; s. c. 2 Dillon, 50; s. c. 20 Wall. 31.

The relinquishment of a contingent right of dower, without any agreement for compensation therefor, is not a valuable consideration for a subsequent conveyance. *Ibid.*

A promise which is not founded upon a valuable consideration is voluntary, and not a sufficient consideration for a transfer. *Ibid.*

A voluntary settlement by a debtor who is insolvent is fraudulent. *Keating v. Keefer*, 5 B. R. 133; s. c. 1 L. T. B. 266; s. c. 4 L. T. B. 162; *Kehr v. Smith*, 7 B. R. 97; s. c. 10 B. R. 49; s. c. 2 Dillon, 50; s. c. 20 Wall. 31.

In determining whether the donor retains enough to meet his liabilities, attention should be given to the business in which he is engaged, the society in which he lives, and his necessary expenses. The economy of country life does not furnish a standard or measure for city transactions. *Sedgwick v. Place*, 10 B. R. 28; s. c. 5 B. R. 168; s. c. 5 Ben. 184; s. c. 12 Blatch 163.

If the subsequent expenditures in improving the property are in pursuance of a plan formed at the time of the gift thereof, the whole will be taken as one transaction. *Ibid.*

A voluntary conveyance made by a person who is indebted is *prima facie* fraudulent, and the burden is on the grantee to show that the debtor had abundant means, besides the property conveyed, to pay all his debts. *Pratt v. Curtis*, 6 B. R. 139.

The assignee alone can impeach a voluntary conveyance, and work out the equity of antecedent creditors. *Ibid.*

When a deed is void as to existing creditors, and is, therefore, set aside, all creditors, both prior and subsequent, participate in the fund *pro rata*. A man who is indebted and unable to pay can not, as against his creditors, part with his property under the name of a sale at an undervalue, so as to give away the surplus value to a father, son, friend, or favored creditor. *Mitchell v. McKibbin*, 8 B. R. 548; s. c. 29 Leg. Int. 412.

A voluntary settlement by a man who is indebted, is fraudulent and void if the debts existing at the time of the conveyance are only paid by contracting other obligations which finally result in insolvency. *Antrim v. Kelly*, 4 B. R. 587.

The earnings of a feme covert are by the common law the property of the husband and liable for his debts, and do not constitute a good consideration for a conveyance. *Keating v. Keefer*, 5 B. R. 133; s. c. 1 L. T. B. 266; s. c. 4 L. T. B. 162.

The payment by a feme covert of her money toward a purchase of property, without insisting upon any agreement for a reconveyance or conveyance of any interest to her, is conclusive evidence of a gift of the

money to the husband, without any right on her part to reclaim any interest in the land or in its proceeds as against him or his creditors. *Ibid.*

A purchase in the name of a feme covert by the husband constitutes a gift to the same extent, and with the same effect, as if the property were first conveyed to him, and then by him to her. *Ibid.*

If a party furnished the money with which a house was purchased in the name of the bankrupt, and then subsequently took a note therefor which he proved against the estate, a conveyance of the house to him, after the giving of the note, will be claimed to be void, and not an execution of the resulting trust. *Napier v. Server*, 2 W. N. 400.

When the deed is kept from record, and the debtor appears as the owner and obtains credit upon the faith of the property, a voluntary conveyance is void as to subsequent creditors. *Keating v. Keefer*, 5 B. R. 133; s. c. 1 L. T. B. 266; s. c. 4 L. T. B. 162; in *re Rainsford*, 5 B. R. 381.

A voluntary conveyance made with the intent to cast on creditors the hazards of future speculations, and to provide a home in case of disaster, is fraudulent. In *re Rainsford*, 5 B. R. 381.

The assignee claims not under but adversely to a fraudulent deed. He claims that the deed is void as to creditors, and on this ground alone attacks it, and upon this ground alone has he any right to the property. He can not claim under it, and must claim against it. When it is decreed to be fraudulent and void at his instance, he can not set it up to defeat the right of the debtor's wife to dower. He can not ask that the same instrument be held void as to creditors, and then in their favor held valid as to the wife. The debtor's wife is not, under such circumstances, barred of her dower. *Cox v. Wilder*, 7 B. R. 241; s. c. 5 B. R. 443; s. c. 2 Dillon, 132; s. c. 5 L. T. B. 500.

The exemption from execution is a right or privilege given to the debtor. He may waive it by not claiming the exemption. If he does not choose to assert any claim to have the property exempted, the fraudulent grantee is in no position to claim it as against the assignee. *Edmonson v. Hyde*, 7 B. R. 1; s. c. 2 Saw. 205; s. c. 5 L. T. B. 380. *Contra*, *Kehr v. Smith*, 7 B. R. 97; s. c. 10 B. R. 49; s. c. 2 Dillon, 50; s. c. 20 Wall. 31.

Where by the State laws a feme covert may own property in her own right and carry on business in her own name, she may employ her husband and pay him. She has a right to all the advantages that flow to her from her own or her husband's tact and foresight, so long as his means, services, and earnings do not enter into her business. Property thus obtained bona fide can not be taken from her and turned over to the creditors of her husband. On the question of the ownership of such property, the presumptions are all in her favor. *Driggs v. Russell*, 3 B. R. 161; s. c. 1 L. T. B. 161; s. c. 1 C. L. N. 353; in *re Eldred*, 3 B. R. 256; s. c. 1 C. L. N. 389.

If the personal labor and capacity of the husband have contributed largely to the accumulation of property held as his wife's separate estate, or if a successful business conducted in her name has been wholly managed by her, and its profits resulted alone from her industry, skill, and economy, then, as by the settled principles of law which govern the

relative rights of husband and wife, even the proceeds of her labor and industry ordinarily belong to him, the property so acquired is subject to the debts of the husband, whatever equitable rights the wife may have as between herself and him; with this exception, however, that the skill, care, or labor of either husband or wife bestowed on her estate, so far as may be reasonably necessary, inures to the benefit of such estate, and does not render it liable to the husband's debts. *Shackleford v. Collier*, 6 Bush, 140.

Where a husband receives money from his wife and engages in transactions in real estate in her name until he accumulates property of considerable value by his skill and energy, the property is liable to his assignee. *Muirhead v. Aldridge*, 14 B. R. 249.

According to the laws of New York, as interpreted by the courts, a married woman may own property of every description in the same manner as if she were a feme sole. She may engage in trade, and her labor and her time are not the property of her husband. She may even employ the time and labor of her husband in the business of using her capital in trade, and she may support her husband out of the profits of her business; and neither the fact that she employs her husband, nor the fact that the labor and skill of the husband contribute to the success of the business, nor the fact that the husband and his family are supported out of the profits of the business, will make the business or its profits the property of the husband. *Voorhees v. Bonesteel*, 7 Blatch. 495; s. c. 16 Wall. 16.

Under the laws of Georgia, a feme covert, with the consent of her husband, may have a separate estate in her earnings, and the purchase of property in her name with such earnings is not fraudulent. *Glenn v. Johnson*, 18 Wall. 476.

A mere intent to prefer does not render a transfer fraudulent which is otherwise valid. *Cookingham v. Ferguson*, 4 B. R. 636; s. c. 8 Blatch. 488.

Parties who have taken transfers from the fraudulent vendee are necessary parties. *Ibid*.

By the laws of Florida, an assignment appropriating the property to such creditors as shall sign a compromise agreement, and none others, with a direction that the surplus shall then revert to the assignor, is not an assignment of the whole of the assignor's property, and is fraudulent and void. *In re Broome*, 3 B. R. 444; s. c. 3 Ben. 488.

If a fraudulent assignment has not been expressly assented to by the creditors, it is merely a power which is revoked by the commencement of the proceedings in bankruptcy. *Ashley v. Robinson*, 29 Ala. 112.

The assignee may recover property fraudulently purchased in the name of another, after the commencement of the proceedings in bankruptcy, with the funds of the bankrupt. *Hyde v. Cohen*, 11 B. R. 461.

A lien is not a property in the thing itself, nor does it constitute a mere right of action for the thing. It more properly constitutes a charge upon the thing. In some general sense creditors have an equitable lien upon property purchased with the debtor's funds in the name of another. So

they would have if a general liability instead of a resulting trust had been declared. So debts are an equitable lien upon property fraudulently transferred by the debtor, and it may be said that every debtor is a trustee for his creditors, and bound to use his property for their benefit, and that creditors have an equitable lien upon the property of the debtor. But in all these cases the usual remedies are to be pursued to create and force the lien before a specific charge creating an incumbrance is created. A creditor can not enforce the liability of a resulting trust under the statute without a preliminary judgment and execution. Before the equitable interests of a debtor can be reached in equity, all available legal remedies must be exhausted. Neither a judgment nor execution constitutes a lien upon equitable interests. The commencement of the equitable action and the filing of the *lis pendens* are necessary for that purpose. *Ocean Nat'l. Bank v. Olcott*, 46 N. Y. 12.

It is an easy matter for parties to go through the form of paying and receiving money in the presence of witnesses. This is the common device of parties contriving a fraud, but endeavoring to fortify themselves with the evidence of good faith. So, too, the placing of the device "agt." on the sign is so generally the cover of fraud, that so far from freeing the transaction from suspicion, it only serves to awaken it. When the parties are competent witnesses in the cause, but do not testify or offer any explanation of the transaction, it is a sound rule, sustained by reason as well as by authority, that the presumption is, that the evidence in their possession, if given, would be in corroboration of that which has already been given against them. In *re Hussman*, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 C. L. N. 177.

A conveyance which is made by an insolvent to a relative of nearly all his property for an inadequate price, for the purpose of putting it out of the reach of his creditors, and which is absolute in form, but in fact on secret trust for the benefit of the grantor and such creditors as he may see fit to select, and which is kept from record for nearly a year, has nearly every badge of fraud. In *re J. H. C. Lutgens*, 7 Pac. L. R. 89.

Evidence of prior transactions between the same parties which tends to show the consideration of the conveyance and the inducements which led the debtor to make it, bears directly upon the question whether it was made in good faith or in fraud of creditors, and is admissible. *Knowlton v. Moseley*, 105 Mass. 136.

When goods covered by a bill of sale are left upon the premises of the original owner in charge of a person partially employed by him, the transfer is valid when there is no evidence that a creditor or a purchaser has been misled or deceived thereby. *Jenkins v. Mayer*, 3 B. R. 776; s. c. 2 Biss. 303.

A judgment confessed upon a defective statement is not absolutely void, but only so as to creditors who have a lien upon the property sought to be affected by the judgment. It has, indeed, been ruled that even as against lien creditors, the insufficiency of statement is only *prima facie* evidence of fraud, and that it is admissible to support the judgment by proof that the transaction was in good faith and the judgment confessed

upon an actual existing debt. The bankruptcy act must be construed as giving the creditors who prove their debts, from and after the filing of the petition, such a direct interest in the property or assets of the bankrupt as to enable them, or the assignees for them, to attack such a judgment as fraudulent in law or fact, even though their claims do not consist of judgments. In re Price Fuller, 4 B. R. 115; s. c. 1 Saw. 243.

The statutes requiring chattel mortgages to be filed in the office of the county recorder, do not make a mortgage valid which would otherwise be void as to creditors. It would be a serious drawback to all trading operations, if a dealer were obliged to search the files of the recorder's office to ascertain whether there is a mortgage on property held out to the world by a party as his own. In re Manly, 3 B. R. 291; s. c. 2 Bond, 261; s. c. 2 L. T. B. 89; Robinson v. Elliott, 11 B. R. 553; s. c. 22 Wall. 513.

No acts of the assignor, after the assignment, can invalidate it, or afford any evidence from which fraud in fact can be legitimately inferred. When a conveyance is not fraudulent at the time of the making of it, it shall never be said to be fraudulent for any matter ex post facto. Beck v. Parker, 65 Penn. 262.

The title of a fraudulent grantee is good against all parties except the assignee and creditors. A tenant can not defeat the title of the grantee by showing fraud in a transfer by his landlord, at least until he has been notified by the landlord's assignee of a claim for the property. Until such notice the tenant can not be held liable to the assignee for rent. Steadman v. Jones, 65 N. C. 388.

Although an indorsement on a mortgage to the effect that it shall cover property acquired after its execution is made for the purpose of defrauding creditors, yet it will not affect the validity of the original mortgage. Whitthed v. Pillsbury, 13 B. R. 241.

The assignee has no greater rights than the judgment creditor, and a bona fide purchaser from a fraudulent grantee will be protected, although his purchase was made after the appointment of the assignee. Beall v. Harrell, 7 B. R. 400; s. c. 1 Woods. 476; Murray v. Jones, 50 Ga. 109.

If the purchaser has notice of facts sufficient to put him on the inquiry, he is not a bona fide purchaser. Beall v. Harrell, 7 B. R. 400; s. c. 9 B. R. 49; s. c. 17 Wall. 590.

Although a gift is void, a mortgagee who makes a loan in good faith gets a good title. Sedgwick v. Place, 10 B. R. 28; s. c. 12 Blatch. 163.

A mortgagee who takes his mortgage to secure a desperate debt due by the donor, is not a purchaser for value if he is aware of the defects of the title. Ibid.

A party who, after the commencement of proceedings in bankruptcy, purchases at a sale under a fraudulent execution, does not obtain a valid title as against the assignee. Ibid.

If the donee has sold the property, the assignee may recover the value from him. Ibid.

To constitute a bona fide purchaser, he must be without notice of the fraud, not only at the time of the purchase, but also at the time of the



actual payment of the consideration. *Marsh v. Armstrong*, 11 B. R. 125; s. c. 20 Minn. 81.

The lien of a judgment rendered after the making of a fraudulent conveyance, and before the commencement of the proceedings in bankruptcy, is preserved, and is entitled to priority when the conveyance is set aside. *Codwise v. Gelston*, 10 Johns. 507.

When a fraudulent deed is set aside, the property should be turned over to the assignee. *Sands v. Codwise*, 4 Johns. 536.

When a fraudulent conveyance of land is set aside, all the stock and grain, except such as the law exempts, will be considered assets. *Keating v. Keefer*, 5 B. R. 133; s. c. 1 L. T. B. 266; s. c. 4 L. T. B. 162.

The account for rents and profits should only be taken from the time of filing the petition in bankruptcy. *Sands v. Codwise*, 4 Johns. 536.

Expenditures may be set off against rents and profits. *Ibid.*

A person who takes a mortgage from a fraudulent grantee has no right to sell the property after notice of the claim of the grantor's assignee. *Brooks v. D'Orville*, 7 Ben. 485.

If a party in good faith takes a mortgage for a valuable consideration from a fraudulent grantee, it will be valid against the assignee. *Ibid.*

ACT OF 1898, CH. 5, \* \* \* § 47. **Duties of Trustees.**—  
 (a) Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the

items and estimated value thereof to the court as soon as practicable after their appointment.

(b) Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

ACT OF 1898, CH. 7, § 61. **Depositories for Money.**—(a) Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

ACT OF 1867, § 5047. The assignee shall have the like remedy to recover all the estate, debts, and effects in his own name as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If, at the time of the commencement of the proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. And if any suit at law or in equity, in which the bankrupt is a party in his own name, is pending at the time of the adjudication of bankruptcy, the assignee may defend the same in the same manner and with the like effect as it might have been defended by the bankrupt.

Statute revised — March 2, 1867, ch. 176, §§ 14, 16, 14 Stat. 523, 524. Prior Statutes — April 4, 1800, ch. 19, § 13, 2 Stat. 25; Aug. 19, 1841, ch. 9, § 3, 5 Stat. 442.

During pendency of a bill in equity brought by the assignee for the redemption and sale of the bankrupt's real estate, an incumbrancer will not be allowed by redeeming to acquire any absolute title to the property, to exclusion of assignee or the other incumbrancers. *In re Longfellow*, 17 B. R. 27.

Where the assignee has used the general funds of the estate to redeem the real estate of the bankrupt, at request of the subsequent incumbrancers, the amount so paid should be refunded out of the proceeds of sale of the premises. *Ibid*.

Assignee can not maintain a suit in equity to obtain possession of property alleged to belong to the estate. The remedy is at law. *In re The Oregon Iron Works*, 17 B. R. 404.

An assignee of corporate stock who has caused it to be transferred to himself on the books of the company, and holds it as a collateral security for a debt due from his assignor, is liable for the unpaid balances thereon. *Pullman v. Upton, Assignee*, 17 B. R. 489.

Assignee can not reclaim money deposited for a special purpose, in which the person holding the deposit has acquired a vested interest. *Newcomb v. Launtz*, 18 B. R. 276.

The assignee may redeem property of the bankrupt, which has been sold on execution to the judgment creditor, without paying the unsatisfied balance of the judgment, or taking the property subject to the lien of such judgment. *Lloyd, Assignee, v. Hoo Lue et al.*, 17 B. R. 170.

Under the law of 1867, held, that a register had no authority to set off exempt property to the bankrupt, nor to direct assignee in the matter. *In re Peabody*, 16 B. R. 243.

An objection, that the assignee did not obtain permission from the bankruptcy court to bring the suit, is of no avail unless it is pleaded. *Avery v. Ryerson*, 34 Mich. 362.

If the assignee of a mortgagee who held a second mortgage, dies after the entry of a decree pro confesso, for want of an appearance, and before a final decree in a proceeding to foreclose a prior mortgage, the sale will not affect the second mortgage. *Ibid.*

If the assignee is finally discharged after more than two years from the time of his appointment, he is not a necessary party to an action by a creditor, instituted before the commencement of the proceedings in bankruptcy, to set aside a fraudulent conveyance. *Phelps v. Curts*, 16 B. R. 85.

**Original Suits.**—This provision is limited by the preceding section. The assignee can only sue for the property or rights of action which pass to him as assignee, and can only prosecute actions of a like character in his own name. *Noonan v. Orton*, 12 B. R. 405; s. c. 34 Wis. 259.

The statement in a complaint that the plaintiff is assignee may be treated as surplusage, or at most as *descriptio personae*, and may be disregarded. *Dambmann v. White*, 12 B. R. 438; s. c. 48 Cal. 439.

It is not necessary to allege in detail the adjudication, the appointment of assignee, and the assignment and record thereof. As in the case of an executor or administrator, it is only necessary to state ———, assignee of the estate of ———, duly adjudged a bankrupt according to the statute in such case made and provided. *Ethridge v. Jackson*, 19 I. R. R. 134; s. c. 7 Pac. L. R. 132; *Wheelock v. Lee*, 10 B. R. 363; s. c. 64 N. Y. 242; *Hastings v. Fowler*, 2 Ind. 216.

The assignee's title to the bankrupt's estate, and right to sue therefor, are derived from the assignment, and hence a copy of the assignment need not be procured before the institution of a suit. *Rogers v. Stevenson*, 16 Minn. 68.

After the execution of a deed of assignment the bankrupt is entirely divested of his property, and the same is vested in his assignee. The whole estate is conveyed by the assignment, and there is no residuary interest in the bankrupt. It results as a necessary legal consequence that the assignee may and alone can maintain ejectment. His is the

title; to him the real estate of the bankrupt exclusively belongs, and in the event of an ejectment, he is the person dispossessed and injured. *Barstow v. Adams*, 2 Day, 70. Vide *Fales v. Thompson*, 1 Mass. 34.

In proceedings in bankruptcy, the legal title vests in the assignee under the assignment. Whatever right the bankrupt had is assigned to and vests in the assignee, who thereby becomes, for the purpose of maintaining or defending suits, possessed, as of his own property, of the estate assigned to him. It is true, he holds the title of the property when recovered, in trust for certain purposes specified in the statute; but as between him and a stranger, he holds the title, and may assert it in the same form of action as though he owned the fee. *Dambmann v. White*, 12 B. R. 438; s. c. 48 Cal. 439.

So far as a removed executor has claims against the estate of a decedent, they may be asserted in the probate court by his assignee. *Appling v. Bailey*, 44 Ala. 333.

A party who takes an assignment of a chose in action from the bankrupt after the commencement of the proceedings in bankruptcy, has a good title if the proceedings are discontinued without the appointment of an assignee before the trial of a suit on such chose in action. *Kline v. Bauendahl*, 12 B. R. 375; s. c. 6 N. Y. Supr. 546; s. c. 11 N. Y. Supr. (Hun) 265.

A bankrupt can not have relief in respect to lands where the title to the land or interest in it is vested in his assignee. The effect of his bankruptcy can not be avoided by an averment that he is a trustee for his wife, she not being made a party. *Muller v. Erich*, 5 Pac. L. R. 223.

The assignee is clothed with the legal title as well as the beneficial interest in a judgment rendered in favor of the bankrupt, and must proceed in his own name against a sheriff for neglecting to return an execution issued thereon, although the execution was issued in the name of the bankrupt after the commencement of the proceedings in bankruptcy. *Gary v. Bates*, 12 Ala. 544.

The bankrupt can not institute an action of trover for the conversion of property belonging to the estate after the commencement of the proceedings in bankruptcy, for, in order to maintain such a suit, the plaintiff must have a right of property in the goods converted, as well as the right of possession at the time of the conversion. *Redman v. Gould*, 7 Blackf. 361.

In the absence of all proof, the presumption is that the equitable interest is united with and follows the legal title, and, under such circumstances, a suit can not be instituted in the name of the bankrupt on a note made payable to him prior to the commencement of the proceedings in bankruptcy, although the suit is entered to the use of a third party. *Griswold v. McMillan*, 15 Ill. 590.

The assignment extends to all claims founded in property. In all cases where the cause of action would survive to the executor of a bankrupt, it passes to his assignee. *Sullivan v. Bridge*, 1 Mass. 511. Vide *Bird v. Hempstead*, 2 Day, 272; s. c. 2 Day, 293.

A right of action against a sheriff for negligence in the levy of an execution, whereby the claim was lost, vests in the assignee of the judgment creditor. *Sullivan v. Bridge*, 1 Mass. 511.

A suit on a judgment in the name of the bankrupt can not be maintained, for all suits instituted after the appointment of the assignee should be brought in his name, or at least prosecuted for the benefit of the creditors whom he represents. *Cook v. Lansing*, 3 McLean, 571.

If no plea in abatement is interposed, the assignee may recover a moiety of a debt due to a firm of which the bankrupt and another were members. *Barclay v. Carson*, 2 Hay (N. C.), 243.

The bankrupt can not institute a suit in the name of a third person for his benefit, where his interest in the cause of action accrued prior to the commencement of the proceedings in bankruptcy. *Berry v. Gillis*, 17 N. H. 9.

The bankrupt has the exclusive right to sue for a trespass committed upon the exempt property prior to the commencement of proceedings in bankruptcy. It is not necessary for him to produce a certificate of exemption, for what the law requires to be done it presumes has been done, until the contrary is shown. *Selling v. Gunderman*, 35 Tex. 345.

The bankrupt may institute an action for a levy on property which was exempt from execution, although the property was sold after the commencement of the proceedings in bankruptcy, and before the allowance of the exemption by the assignee. *Williams v. Miller*, 16 Conn. 144.

If a note is allowed to the bankrupt as a part of his exemption, he may institute a suit thereon in his own name. *Henly v. Lanier*, 15 B. R. 280; s. c. 75 N. C. 172.

A creditor may file a bill in equity to reach certain assets of the bankrupt, without a previous refusal of the assignee to institute a suit where the whole conduct of the assignee shows that he has abandoned all claim to it. *Rugely v. Robinson*, 19 Ala. 404.

When a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it. If the agent sues it is no ground of defense that the beneficial interest is in another, or that the agent, when he recovers, will be bound to account to another. If the agent becomes bankrupt, he may still sue in his own name. If a party pledges his business for a debt, with an agreement that it shall be carried on with the capital of the pledgee, he has no beneficial interest in contracts subsequently made, and in case of bankruptcy may nevertheless sue upon them in his own name. *Rhoades v. Blackiston*, 106 Mass. 334.

The assignee is a necessary party to a bill filed by a creditor to reach the equitable assets of the bankrupt. *Rugely v. Robinson*, 19 Ala. 404.

The bankrupt may institute an action at law in his own name on a claim which was not placed on his schedules. *Steele v. Towne*, 28 Vt. 771.

If the judgment was assigned prior to the commencement of the proceedings in bankruptcy, a sci. fa. may be maintained in the name of the bankrupt for the benefit of the owner of the judgment. *Boone v. Stone*, 8 Ill. 537.

If the payee of a note obtains possession of the note after a sale thereof by his assignee, he is remitted to his original legal title, and may transfer it by his indorsement. *Birch v. Tillotson*, 16 Ala. 387.

If a note passes to the assignee by delivery without indorsement, and he sells and transfers it to the bankrupt by delivery, the bankrupt may be considered as reinstated in his original right, and may sue thereon in his own name. *Drury v. Vannever*, 59 Mass. 442.

If a note passes to the assignee by delivery without indorsement, and he sells and transfers it by delivery to one of the bankrupts, the latter may sue thereon in the name of the bankrupts. *Ibid.*

If the bankrupt purchases a chose in action from the assignee, he may bring an action thereon in his own name. *Udall v. District*, 48 Vt. 588.

If the bankrupt made an equitable assignment of a chose in action before the commencement of the proceedings in bankruptcy, he may maintain an action in his own name if he subsequently purchases the claim. *Blin v. Pierce*, 20 Vt. 25.

A party who took an assignment of a chose in action as a collateral security prior to the commencement of the proceedings in bankruptcy, can not institute a suit in equity where the bankrupt had no beneficial interest therein, although the assignee refuses to allow the use of his name, for the creditor may sue at law in the name of the bankrupt. *Ontario Bank v. Mumford*, 2 Barb. Ch. 596.

The purchaser of a chose in action from the assignee takes merely an equitable title, and must sue in the name of the assignee for his use. *Camack v. Bisquay*, 18 Ala. 286.

The purchaser of a chose in action from the assignee can not maintain an action thereon in his own name. *Leach v. Greene*, 12 B. R. 376; s. c. 116 Mass. 534.

If a chose in action is sold by the assignee, an action may be brought in the name of the bankrupt for the benefit of the purchaser. The authority given an assignee in bankruptcy to sue for and recover, in his own name, the debts due the bankrupt, is not for the benefit of the debtors nor of the purchasers, but for the benefit of the estate, and when the estate is not to be benefited by such suit, no reason is perceived why it should be brought in his name. *Foster v. Wylie*, 60 Me. 109; s. c. 6 L. T. B. 576; *Mims v. Swartz*, 10 B. R. 305; s. c. 37 Tex. 17.

The purchaser may also sue in his own name. *Mims v. Swartz*, 10 B. R. 305; s. c. 37 Tex. 17.

The act of the assignee in selling a chose in action can not be collaterally impeached in a State court. *Ibid.*

If a suit is instituted in the name of the assignee without his authority, and afterward ratified by him, its prosecution in his name is lawful. *Carr v. Lord*, 29 Me. 51.

A plea that the plaintiff is not the assignee of the bankrupt is a plea in bar, for it denies that the plaintiff has any cause of action. *Peel v. Ringgold*, 6 Ark. 546.

A confession of judgment admits the assignment and the right of action to be in the assignee agreeably to the declaration. Suffering judg-

ment to go by default admits the contract to be as declared on. *Kelly v. Holdship*, 1 Browne, 36.

A plea that a note was indorsed by one of two payees after he became a bankrupt, is defective unless it shows that the indorsement was made by a party who was not duly authorized to make it, and that the note was so held as to vest in the assignee, and also gives the name of the assignee. *Fulweiler v. Singer*, 2 Greene (Iowa), 372.

A plea of the bankruptcy of the plaintiff is bad when the obligation was given after the filing of the petition although it alleges that the consideration was an indebtedness that accrued before the bankruptcy. *Beacon v. Howard*, 11 B. R. 486; s. c. 44 Ind. 413.

A plea that after the rendition of the judgment, and before the issuing of a sci. fa., the plaintiff became a bankrupt, is a good plea, for a sci. fa. to revive a judgment, can only be maintained in the name of the assignee. *Boone v. Stone*, 8 Ill. 537.

The assignee stands in the place of the bankrupt, and must establish his title to real estate in the same way. *Talcott v. Goodwin*, 8 Day, 264.

The plaintiff must prove himself to be duly appointed assignee by producing a certified copy of the record or of the assignment. *In re McIver & Moore*, 1 Cranch C. C. 90.

If it is proved that proceedings in bankruptcy were duly commenced, it devolves upon the party who asserts that they were interrupted or superseded to prove it. In the absence of proof to the contrary, it will be presumed that the proceedings which follow as of course after those that are proved did take place, including the appointment of an assignee. *Janes v. Beach*, 1 Mich. N. P. 94.

If the adjudication of bankruptcy is established, the appointment of an assignee may be presumed. *Mims v. Swartz*, 10 B. R. 305; s. c. 37 Tex. 17; *Janes v. Beach*, 1 Mich. N. P. 94.

As an assignment is required to be made in all cases as a matter of course, the maxim that in courts of general jurisdiction, *omnia praesumuntur rite esse acta* applies, and in the absence of any allegation or proof to the contrary, the courts, in a collateral action, will generally assume that an assignment has been made. *Swepton v. Rouse*, 65 N. C. 34.

If the bankruptcy is expressly admitted, and the right of the assignee to sue is not put in issue by any of the pleas, it is not incumbent on the assignee to prove the assignment. *Zantzinger v. Ribble*, 4 B. R. 724; s. c. 36 Md. 32.

If a party permits the transcript from the records of the bankruptcy court to establish the presumption of the execution of an assignment, without an objection as to the nonproduction of the deed, he can not raise that question for the first time in the appellate court. *Crayton v. Hamilton*, 37 Tex. 269.

An assignee stands in a representative capacity, and may sue and be sued in that relation. He may, therefore, under the laws of Pennsylvania, appeal from an award without paying the costs or entering in recognition. *Morse v. Gritman*, 10 B. R. 132; s. c. 31 Leg. Int. 246.

The bankruptcy of the plaintiff may be proved under the general issue, where the action has been instituted since the commencement of the proceedings in bankruptcy. *Sims v. Ross*, 16 Miss. 557; *Berry v. Gillis*, 17 N. H. 9; *Lefler v. Hunt*, 8 Blackf. 195; *Pike v. Crehore*, 40 Me. 503.

The objection that the indorsement of a note was made by the payee after the commencement of proceedings in bankruptcy may be taken under the general issue, for the plaintiff must show that he has a legal title to the note. *Birch v. Tillotson*, 16 Ala. 387.

**Continuance of Pending Suits.**—The provisions of this section include suits and actions pending in the State courts, and are addressed to the courts in which suits or actions are pending, quite as much as to the Federal courts. The power of State courts to proceed with pending suits in cases where creditors have provable debts, but which they do not prove under the bankruptcy proceedings, under certain prescribed limitations, is recognized by the bankruptcy act itself. The jurisdiction of the State courts is not extinguished, except in those cases where the creditor proves his debt or claim. The bankruptcy court has no control over the State courts, and can not determine questions of law that may arise upon cases pending therein. The State courts having jurisdiction of the parties and subject-matter, must determine the questions as they arise according to law, subject to the final judgment of the proper appellate tribunal. In *re Clark et al.*, 3 B. R. 491; s. c. 4 Ben. 88; *Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325; *Clark v. Binninger*, 5 B. R. 254; s. c. 39 How. Pr. 363; *Peck v. Jenness*, 7 How. 612; *Hewitt v. Norton*, 13 B. R. 276; s. c. 1 Woods, 68; *Linthicum v. Fenley*, 11 Bush, 131.

The provision that the assignee may prosecute and defend all suits pending at the time of the adjudication of bankruptcy to which the bankrupt is a party does not oblige him to seek a remedy in that way. *Traders' National Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87.

The words "he may prosecute" are permissive. It only becomes a duty for an assignee to prosecute a suit when the interest of the estate demands it, of which the assignee is, in the first instance, the judge. *Reade v. Waterhouse*, 10 B. R. 277; s. c. 12 Abb. Pr. (N. S.) 255; s. c. 52 N. Y. 587; s. c. 35 N. Y. Supr. 78.

The bankrupt may continue to prosecute an action of replevin in his own name for an article which has been set apart to him as exempt by the assignee. *Scott v. Wilkie*, 65 N. C. 376.

Until an assignee is appointed and qualified, and the conveyance or assignment made to him, the title to the property remains in the bankrupt. Until that time the bankrupt may prosecute pending actions, for there is no one to take his place. *Sutherland v. Davis*, 10 B. R. 424; s. c. 42 Ind. 26.

A bankrupt may continue to prosecute a pending action till some one appears with a better right. *Gilmore v. Bangs*, 55 Ga. 403.

The bankrupt can not prosecute an action in chancery to obtain satisfaction of a judgment, although he did not place it on the schedules. *Planters' Bank v. Conger*, 20 Miss. 527.



A motion for leave to prosecute the suit in the name of the bankrupt, for the benefit of the assignee, should be denied, because the bankrupt, by his bankruptcy, becomes *civilliter mortuus*, and can no longer sue either for himself or another. All his rights of property pass by the assignment to the assignee, in whose name alone can the suit be prosecuted. *Cannon v. Welford*, 22 Gratt. 195; *Lacy v. Rockett*, 11 Ala. 1002. Contra, *Noonan v. Orton*, 12 B. R. 405; s. c. 34 Wis. 259.

An assignee upon filing a duly certified copy of the assignment, may on notice to the plaintiff have a pending action entered to his use. *Cottrell v. Mann*, 1 W. N. 157.

If the plaintiff is declared a bankrupt after the commencement of a suit, the court may instruct the jury, if they find for the plaintiff, to find their verdict in the name of the plaintiff for the use of his assignee in bankruptcy. The verdict and judgment will be a sufficient protection to the defendant, and it is not a matter of concern to him who gets the money. *Woodall v. Holliday*, 10 B. R. 545; s. c. 44 Ga. 18.

A decree entered after the bankruptcy of the complainant is void, and can not be enforced by an attachment, for the suit thereby became defective. *Springer v. Vanderpool*, 4 Edw. Ch. 362.

The assignee may be admitted to prosecute the suit in his name, although third persons have an interest in the claim. *Hammond v. Rice*, 18 Vt. 353.

The assignee may prosecute a pending action in his own name, although it is pending in a State court. *Ames v. Gilman*, 51 Mass. 239.

If the suit is continued without exception in the name of the bankrupt, the defendant can not ask the court to instruct the jury, that if they render a verdict against him it must be for the use of the assignee. *Southern Express Co. v. Connor*, 12 B. R. 53; s. c. 49 Ga. 415.

The suit is not abated by the substitution of the plaintiff's assignee. *Wise v. Decker*, 1 Cranch C. C. 190; *Hammond v. Rice*, 18 Vt. 353.

The substitution of the assignee, when actually made, relates back to the commencement of the proceedings in bankruptcy. *Browne v. Ins. Co.*, 4 Yeates, 119.

The State court can not proceed to hear and decide a case for the specific performance of a contract to convey land, if the vendor becomes bankrupt after the commencement of the suit, unless the assignee is made a party. *Swepson v. Rouse*, 65 N. O. 34.

The assignee is the only person who can move to set aside an execution after the judgment debtor is declared bankrupt. *Maris v. Duren*, 1 Brewst. 428; s. c. 6 Phila. 327.

When the assignee seeks to be made a party defendant to an action brought to recover the possession of property alleged to have been wrongfully taken and converted by the bankrupt, he should show that he has some right to the property in controversy. A motion which does not set forth such a right will be dismissed. *Gunther et al. v. Greenfield et al.*, 3 B. R. 730; s. c. 8 Abb. Pr. (N. S.) 191.

Where property of the bankrupt has been sold, and the proceeds paid to the complainant under a decree which is subsequently reversed, the

complainant can not defeat a motion for an order directing a repayment of the money by dismissing the bill before the assignee becomes a party. *Kane v. Pilcher*, 7 B. Mon. 651.

The commencement of proceedings in bankruptcy does not affect the jurisdiction of a State court over an action then pending to foreclose a mortgage, and a sale under a decree entered after the appointment of an assignee will pass a valid title to the purchaser. *Eyster v. Gaff*, 13 B. R. 546; s. c. 91 U. S. 521; s. c. 2 Col. 28; in re *Mary Irving et al.*, 14 B. R. 289; *Smith v. Gordon*, 2 N. Y. Leg. Obs. 325; s. c. 6 Law Rep. 313; *Cleveland v. Boerum*, 24 N. Y. 613; s. c. 23 Barb. 201; s. c. 27 Barb. 252; *Lenihan v. Hamann*, 8 B. R. 557; s. c. 11 B. R. 471; s. c. 14 Abb. Pr. (N. S.) 274; s. c. 55 N. Y. 652; *Jerome v. McCarter*, 15 B. R. 546. Contra, *Anon.*, 10 Paige, 20; *Ontario Bank v. Mumford*, 2 Barb. Ch. 596; *Johnson v. Fitzhugh*, 3 Barb. Ch. 360; *Fellows v. Hall*, 3 McLean, 487; in re *Abner H. Allen*, 1 N. Y. Leg. Obs. 115; s. c. 5 Law Rep. 362; *Storm v. Davenport*, 1 Sandf. Ch. 135; *Penniman v. Norton*, 1 Barb. Ch. 246.

It is the duty of a State court to proceed with an action to foreclose a mortgage until it is informed by some proper pleading of the bankruptcy of the mortgagor. It is not sufficient for the assignee merely to file a certificate of his appointment without any motion or plea to be made a party or to take part in the case. *Eyster v. Gaff*, 13 B. R. 546; s. c. 91 U. S. 521; s. c. 2 Col. 28.

Where a sale is made after the commencement of proceedings in bankruptcy under a decree entered before the adjudication in an action to foreclose a mortgage in a State court, and a decree for the deficiency is entered against the bankrupt, the decree is a bar to the right of the assignee to raise the question of usury in regard to the mortgage. *Cutter v. Dingee*, 14 B. R. 294.

An assignee appointed after a completed foreclosure by judgment and sale will be bound by the judgment, and especially in a case where the court of bankruptcy has authorized the continuance of the suit before judgment and sale. *Lenihan v. Hamann*, 8 B. R. 557; s. c. 11 B. R. 471; s. c. 14 Abb. Pr. (N. S.) 274; s. c. 55 N. Y. 652.

The mere filing of a petition in bankruptcy does not of itself constitute a sufficient reason for the dismissal of an action pending in a State court. *Hobart v. Haskell*, 14 N. H. 127.

Until the plea of bankruptcy is interposed, the plaintiff is not bound to take notice of the bankruptcy of the defendant. *Fellows v. Hall*, 3 McLean, 281.

Bankruptcy is a fact, and when set up as a defense to a bill in equity by one or all of the defendants, should be pleaded in some regular way. Unless admitted as a fact by the opposite party, with a concession of its effect as barring all relief, it is not of itself cause for dismissing the bill in advance of the hearing. *Ballin v. Ferst*, 55 Ga. 546.

If a fund is in the hand of a receiver appointed by a State court for distribution, the assignee may intervene as a representative of the bankrupt and the general creditors, and contest any claim against the fund. *Louden v. Blanford*, 56 Ga. 150.

If the assignee, with knowledge of the pendency of a bill brought by a creditor prior to the commencement of the proceedings in bankruptcy to vacate a deed alleged to be fraudulent, fails to be made a party to the suit until after a decree is made declaring the deed fraudulent, the creditor is entitled to payment in full out of the proceeds. *Smith v. Gordon*, 2 N. Y. Leg. Obs. 325; s. c. 6 Law Rep. 313.

If a suit is pending against the bankrupt at the time of the commencement of the proceedings in bankruptcy, the plaintiff by due process may cause the assignee to be made a party thereto. *Norton v. Switzer*, 93 U. S. 355; s. c. 27 La. An. 25.

If the assignee is made a party to a pending action in his representative capacity, a judgment against him in his individual character is void. *Ibid.*

If the assignee is made a party to a pending action, the judgment is effectual and operative only to establish the amount and validity of the claim, and may be filed with him as a basis of dividends. *Norton v. Switzer*, 93 U. S. 355; s. c. 27 La. An. 25. *Contra*, *Minot v. Brickett*, 49 Mass. 560.

If a pending action is allowed to proceed to judgment for the mere purpose of establishing the validity of the claim and the amount due, any provision in such judgment awarding a lien to the plaintiff is entirely unavailing. *Norton v. Switzer*, 93 U. S. 355; s. c. 27 La. An. 25. *Vide Switzer v. Zeller*, 27 La. An. 468.

A party to whom a claim has been assigned prior to the bankruptcy of the plaintiff may afterward intervene. The question of the bankruptcy of the plaintiff is not properly before the court upon a motion to intervene. The assignee in bankruptcy may contest the transfer of the claim, but not the defendant. *Smalley v. Taylor*, 33 Tex. 668.

When a chose in action upon which a suit has been brought is assigned for a full and valuable consideration before the commencement of proceedings in bankruptcy, the plaintiff becomes a trustee for the purchaser, and may continue the suit in his own name. His subsequent bankruptcy does not affect the right of his cestui que trust. The assignee in bankruptcy has no interest in the suit, and no right to be substituted as plaintiff. *Valentine v. Holloman*, 63 N. C. 475; *King v. Morrison*, 5 Ark. 519; *Hynson v. Burton*, 5 Ark. 492.

If a judgment was transferred to another, the suit thereon may be continued in the name of the bankrupt. *Penn v. Edwards*, 50 Ala. 63.

If the assignee declines to intervene, an action of replevin may be prosecuted in the name of the bankrupt by the surety on the replevin bond to whom the goods were delivered as security for his liability on the bond. *Sawtelle v. Rollins*, 23 Me. 196.

A party who has taken a transfer of the note may intervene and prosecute the suit in the name of the bankrupt. *Converse v. Sorley*, 39 Tex. 515.

If the assignee sells his interest in property which is in litigation in a court of equity, the purchaser should be made a party instead of the assignee. *Penniman v. Norton*, 1 Barb. Ch. 246.

The court will not permit an action to be prosecuted in the name of the assignee on the motion of a purchaser who has bought the claim from the assignee. *Gale v. Vernon*, 1 Sandf. Ch. 679.

If the assignee sells the claim, the purchaser will not be permitted to prosecute the action in his own name. *Ibid.*

If a suit in the name of the bankrupt is settled and dismissed after the commencement of the proceedings in bankruptcy, the assignee may move to have the case reinstated at the first regular term after his appointment. *Home Ins. Co. v. Hollis*, 14 B. R. 337; s. c. 53 Ga. 659.

Neither the bankrupt nor his attorney has the authority to settle a suit in the name of the bankrupt after the commencement of the proceedings in bankruptcy. *Ibid.*

When a suit is settled after the commencement of the proceedings in bankruptcy, it is not incumbent on the assignee to show that the settlement was wrong in order to have the case reinstated. *Ibid.*

If the complainant becomes bankrupt while a suit in equity is pending, the bill may, on motion of the defendant, be dismissed unless the assignee intervenes within a certain time. *Balley v. Smith*, 10 R. I. 29.

If the assignee declines to intervene and prosecute a bill filed against a conventional trustee alleging a mismanagement of the trust fund, the bankrupt can not make him a party by a supplemental bill. *Ibid.*

The assignee may intervene in an action commenced by the bankrupt by an original bill in the nature of a supplemental bill. *Northman v. Ins. Co.*, 1 Tenn. Ch. 312, 319.

If a demurrer is entered to a plea setting up the bankruptcy of the plaintiff properly, it should be overruled, for no one can be or remain a party to a suit after his bankruptcy. *Collier v. Hunter*, 27 Ark. 74.

A plea of the bankruptcy of the plaintiff should conclude with a verification. *Brown v. Patrick*, 7 Phila. 143.

A plea of the bankruptcy of the plaintiff pendente lite need make no allegation in respect to the jurisdiction of the bankruptcy court, for it will be intended that the petition was filed in the proper court. *Lacy v. Rockett*, 11 Ala. 1002.

If the assignee takes issue upon the plea of the bankruptcy of the plaintiff, and it is found against him, judgment must be entered for the defendant. *Ibid.*

The assignee may avoid a plea of bankruptcy of the plaintiff pendente lite by submitting to make himself plaintiff. *Lacy v. Rockett*, 11 Ala. 1002; *Brooks v. Harris*, 12 Ala. 555.

The defendant may plead that the plaintiff has been declared a bankrupt by the proper district court subsequent to the institution of the suit. Such a plea is a plea in bar. *Lacy v. Rockett*, 11 Ala. 1002; *Hynson v. Burton*, 5 Ark. 492; *King v. Morrison*, 5 Ark. 519.

A plea that the defendant became a bankrupt before the suing out of a writ of error, need not set forth the name of the assignee. *Vairin v. Edmonson*, 9 Ill. 120.

The question whether the person who claims to be assignee of the plaintiff is such, can not be raised by a general demurrer, but only by a plea in abatement. *Manning v. Hunt*, 36 Tex. 118.

The State court is not a mere auxiliary tribunal of the Federal court to entertain the claim of the assignee to property, and to order it to be surrendered up to him unconditionally, right or wrong, to be administered and disposed of by the bankruptcy court. If the aid of the State court is sought and demanded by an assignee to recover property, he must submit to the terms prescribed, and recover or not recover as the principles of law and equity bearing on the rights of the contesting parties demand. He is estopped in such a case to deny the jurisdiction of the State court to decide the merits of the controversy. *Pindell v. Vimont*, 14 B. Mon. 400.

When the assignee appears to defend a pending action, he may adopt the answer already filed. *Fritsch v. Van Mittedorfer*, 2 Oinn. 261.

A plea that a part only of the plaintiffs have become bankrupts pendente lite is a good plea. *Lacy v. Rockett*, 11 Ala. 1002; *Sims v. Ross*, 15 Miss. 557.

The bankruptcy of the plaintiff can not be proved by parol evidence. *Moore v. Voss*, 1 Cranch C. C. 179.

If the assignee is permitted to appear and defend a suit in the name of a bankrupt defendant, he can not be directed to pay costs after the rendition of a judgment. The proper practice in such a case is to move for security for costs at the time of his appearance, or prior to the termination of the proceedings. *Holland v. Seaver*, 21 N. H. 386.

Under the laws of New York the assignee is not liable for costs, except in case of mismanagement or bad faith. *Reade v. Waterhouse*, 10 B. R. 277; s. c. 12 Abb. Pr. (N. S.) 255; s. c. 52 N. Y. 587; s. c. 35 N. Y. Supr. 78.

Costs can not properly be taxed to the assignee before he became a party to the suit. *Norton v. Switzer*, 93 U. S. 355; s. c. 27 La. An. 25.

If a party who has recovered a judgment takes the benefit of the bankruptcy act and afterward dies, the suit in the appellate court should be revived against the assignee in bankruptcy, and not against the administrator. *Moffit v. Cruise*, 7 Cold. 137.

If the judgment debtor is declared a bankrupt after the rendition of a judgment affecting a right of property which would pass to his assignee, the latter is the proper party to bring a writ of error, and he alone can do it. *Knox v. Exchange Bank*, 12 Wall. 379; *Day v. Laffin*, 47 Mass. 280; *Vairin v. Edmonson*, 9 Ill. 120; *Sanford v. Sanford*, 12 B. R. 565; s. c. 58 N. Y. 67.

When the bankrupt is seeking to prevent the establishment of a claim against himself, he has an interest sufficient to entitle him to maintain an appeal. *Sanford v. Sanford*, 12 B. R. 565; s. c. 58 N. Y. 67.

Where the judgment of a justice in a summary proceeding against the bankrupt under the landlord and tenant act is reversed on appeal, the assignee who has been appointed since the commencement of the proceeding is entitled to a writ of restitution, although he never was in possession,

for he is entitled to all the rights of the bankrupt in respect to his property. *McMillan v. Love*, 72 N. C. 18.

Where an action is brought on an appeal bond to recover costs, an objection that one of the appellees became bankrupt after the taking of the appeal and before the dismissal thereof, will be deemed to be waived unless it is pleaded, and can only be pleaded in abatement. *McSpedon v. Bouton*, 5 Daly, 30.

The bankrupt may sue out a writ of error in his own name to remove a judgment rendered against him after the commencement of the proceedings in bankruptcy. *Dormire v. Cogly*, 8 Blackf. 177.

If the defendant is declared a bankrupt before the taking of an appeal, the appeal may be prosecuted in his name or in that of his assignee. *O'Neil v. Dougherty*, 10 B. R. 294; s. c. 46 Cal. 575.

A bankrupt may appeal from a judgment rendered against him as guardian after the commencement of the proceedings in bankruptcy. *Collins v. Marshall*, 10 Rob. (La.) 112.

The time of the adjudication of bankruptcy is the time of filing the petition. *In re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508.

#### ACT OF 1898, CH. 5, § 46. **Death or Removal of Trustees.**—

(a) The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

ACTS OF 1867 and 1874, § 5048. No suit pending in the name of the assignee shall be abated by his death or removal; but, upon the motion of the surviving or remaining or new assignee, as the case may be, he shall be admitted to prosecute the suit in like manner and with like effect as if it had been originally commenced by him.

Statutes revised — March 2, 1867, ch. 176, § 16, 14 Stat. 524. Prior Statutes — April 4, 1860, ch. 19, § 9, 2 Stat. 24; Aug. 19, 1841, ch. 9, § 9, 5 Stat. 442.

ACT OF 1898, CH. 4, § 21. **Evidence; Certified Copy of Order Approving Bond.**— (c) A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

**ACT OF 1867, § 5049.** A copy, duly certified by the clerk of the court, under the seal thereof, of the assignment, shall be conclusive evidence of the title of the assignee to take, hold, sue for, and recover the property of the bankrupt.

Statute revised — March 2, 1867, ch. 176, § 14, 14 Stat. 522. Prior Statutes — April 4, 1800, ch. 19, § 56, 2 Stat. 35; Aug. 19, 1841, ch. 9, § 15, 5 Stat. 448.

When an appellant becomes bankrupt after an appeal taken, his assignee, upon producing a copy of the assignment, duly attested by the clerk of the proper district court, may, on motion, be admitted as a party to the suit in the appellate court in the place of the bankrupt. *Herndon v. Howard*, 4 B. R. 212; s. c. 40 How. Pr. 288; s. c. 9 Wall. 664; *Knox v. Exchange Bank*, 12 Wall. 379.

An uncertified copy of the petition to be declared bankrupt and a certificate of discharge are no evidence of the appointment of an assignee. *Alexander v. McCullough*, 32 Leg. Int. 336.

Oral testimony to prove an assignment is not admissible until evidence is given to show that the original or a certified copy thereof can not be produced. *Burk v. Winters*, 15 B. R. 140; s. c. 28 Ark. 6; *Files v. Harbison*, 29 Ark. 307.

The right of the assignee to maintain a suit does not depend on the instrument of assignment. A copy of an assignment, under the seal of the court, if duly certified, is sufficient to show the assignee's right to sue, although the original assignment is not signed either by the judge or the register. *Zantlinger v. Ribble*, 4 B. R. 724; s. c. 36 Md. 32.

It is not necessary to produce proof of an acceptance of the appointment or of a publication of the appointment or of the recording of the assignment, for a duly certified copy of the assignment is made conclusive evidence of the right to sue. *Rogers v. Stevenson*, 16 Minn. 68; *Faires v. Metoyer*, 6 Rob. (La.) 75.

In a suit instituted by the assignee, it is not necessary to prove all the steps in the proceedings in bankruptcy, for a copy of the assignment is conclusive evidence of the assignee's title. *Dambmann v. White*, 12 B. R. 438; s. c. 48 Cal. 439; *Shawhan v. Wherritt*, 7 How. 627; *Carr v. Gale*, 2 Ware, 330; s. c. 3 W. & M. 38.

If the assignee produces a duly certified copy of the assignment, it is not necessary for him to show the jurisdiction of the district court over the proceedings or the person of the bankrupt. *Cone v. Purcell*, 11 B. R. 490; s. c. 56 N. Y. 649.

Neither the validity of the adjudication of bankruptcy, nor the existence, sufficiency, or validity of the debt of the petitioning creditor can be collaterally drawn in question. In all suits brought by the assignee, the assignment is conclusive evidence of his right to sue. *Barstow v. Adams*, 2 Day, 70; *Rugan v. West*, 1 Binn. 263; *Barclay v. Carson*, 2 Hay (N. C.) 243; *Lovett v. Cutter*, 1 Mass. 67; *Livermore v. Swazey*, 7 Mass. 213; *Den v. Wright*, Pet. C. C. 64.

§ 5050. No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon.

Statute revised — March 2, 1867, ch. 176, § 14, 14 Stat. 522.

Until a conveyance is declared to be void by due course of law, the grantee's right to books and papers conveyed to him is as perfect, to all intents, as against the assignee, as his right to any other property. *Rogers v. Winsor*, 6 B. R. 246.

A receiver appointed by a State court, is entitled to refuse to deliver up the bankrupt's books to the assignee, or to give him possession thereof, until they are properly taken from him by adverse proceedings, but he must produce them to be used on the examination as evidence. In *re William W. Hulst*, 7 Ben. 40.

ACT OF 1898, CH. 3, § 7. **Duties of Bankrupts.**— The bankrupt shall \* \* \* execute to his trustee transfers of all his property in foreign countries.

ACTS OF 1867 AND 1874, § 5051. The debtor shall, at the request of the assignee and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt.

Statutes revised — March 2, 1867, ch. 176, § 14, 14 Stat. 522.

The bankruptcy court will order the bankrupt to execute and deliver to the assignee the proper papers to enable him to be admitted to prosecute suits pending in the State courts in his own name, in the same manner and with the like effect as they might have been prosecuted by the bankrupt; and direct the bankrupt himself to refrain from prosecuting the actions, or applying for any order or decree therein. In *re Clark et al.*, 3 B. R. 491; s. c. 4 Ben. 88; *Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325; *Clark v. Binninger*, 5 B. R. 255; s. c. 39 How. Pr. 363.

ACT OF 1898, CH. 7, § 67. **Liens.** — \* \* \* (d) Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act.

ACT OF 1867, § 5052. No mortgage of any vessel or of any other goods or chattels, made as security for any debt, in good faith and for a present consideration, and otherwise valid, and duly recorded



pursuant to any statute of the United States or of any State, shall be invalidated or affected by an assignment in bankruptcy.

Statute revised — March 2, 1867, ch. 176, § 14, 14 Stat. 522.

This provision can not enlarge the rights or title of the assignee, or make a mortgage invalid against him, which, but for the provision, would have been valid. It appears to have been inserted out of greater caution, lest it should be supposed that valid chattel mortgages would be affected by the assignment, and not with any view of construing the laws regarding record; and so, if the mortgage be one that requires no record, as if it be executed in a State having no statute upon the subject, or if the record is not required between the parties, the provision will not defeat it. *In re Chas. W. Griffiths*, 3 B. R. 731; s. c. *Lowell*, 431; *Coggeshall v. Potter*, 4 B. R. 73; s. c. 6 B. R. 10; s. c. 1 *Holmes*, 75.

It would be going too far to hold all mortgages not included by the terms of the description to be invalidated by the act. The clause expressly saves certain mortgages, but it says nothing as to others. Much less does it say anything as to deeds of trust or conveyances of analogous character. It leaves all deeds and instruments of writing not expressly saved to the general principles of jurisprudence. *In re Wynne*, 4 B. R. 23; s. c. *Chase*, 227; s. c. 2 L. T. B. 116.

Mortgages which are not otherwise valid or duly recorded are not enumerated as protected in favor of the mortgagee, but, on the contrary, are carefully excluded. The attention of Congress was specially called to chattel mortgages, and the language of the act is carefully framed, so as to recognize and protect such liens as were already valid by the laws of the land, the statutes of the United States, or of the State where the transaction occurred. The maxim *expressio unius est exclusio alterius*, applies to other cases. *Edmonson v. Hyde*, 7 B. R. 1; s. c. 2 *Saw*, 205; s. c. 5 L. T. B. 380; *in re Geo. P. Morrill*, 8 B. R. 117; s. c. 2 *Saw*, 356; *Moore v. Young*, 4 *Biss*, 128.

In a contest between the assignee and third parties to ascertain their respective rights as to real estate, which had been purchased by the bankrupt and such parties, under an agreement to furnish the outlay and share in the profit and loss equally, it is necessary to adjust the partnership dealings to the time of the commencement of bankruptcy proceedings, and ascertain the exact interest of the bankrupt and each of his partners in such transaction. Where partnership debts are still outstanding on which the bankrupt's partner is liable, such partner is entitled to a lien upon such real estate until the debts are paid, to indemnify him in case he is compelled to pay them. *Thrall v. Crampton*, Assignee, 16 B. R. 261.

Where one has a valid lien upon property in his custody belonging to another who is on the eve of bankruptcy, and sells the same with knowledge that bankruptcy is imminent, the sale will not be afterward disturbed by the court of bankruptcy if untainted by fraud, if there has been no sacrifice of the property. *In re Roseberry et al.*, 16 B. R. 340.

The lien of a factor for his advancements, charges and commissions is within the meaning of the statute providing that securities taken in good faith, etc., will not be affected by the act. *Ibid.*

Where a mortgage was executed to secure a mortgagee as indorser, and it does not appear that he has taken up any of the indorsed paper, he can claim no rights under the mortgage, and is liable to the assignee for any moneys paid him for its release. *Sessions v. Johnson*, 17 B. R. 64.

A mortgage given as collateral security for a debt, and also to secure mortgagee against liability as surety for the mortgagor, is a valid and subsisting lien from the date of its record to secure such amount as may appear to be due upon the indebtedness secured thereby. *Milner v. Meek*, 17 B. R. 82.

A mortgage executed by a bankrupt prior to commencement of proceedings in bankruptcy, to secure a present indebtedness and also future advances of goods to be made by the mortgagee, is a valid security for such indebtedness, and the amount of advances actually made. *Schulze, Assignee, v. Bolting*, 17 B. R. 167.

A mistake in description of premises in such mortgage may be corrected as against the assignee subsequently appointed. *Ibid.*

It was held in this case (under law of 1867) that where the mortgagee had proved his debt as a secured claim in the proceedings, an action to foreclose the mortgage could be brought in the bankruptcy court, by leave of the court first obtained. *Ibid.*

The rights of a pledgee are not impaired or affected by any of the provisions of the bankruptcy law, nor are they impaired by his failure to appear in the bankruptcy court and refusal to become a party to the proceedings by proving his debt. *Yeatman et al., Assignees, v. N. O. Savings Bank*, 17 B. R. 187.

A bankrupt previous to commencement of the proceedings sold certain premises. Parties who had prior to the conveyance performed work upon the premises subsequently filed a lien therefor and proved their claim in the bankruptcy proceedings, but neglected to state that it was secured by a lien, and received a dividend. In an action to foreclose the lien, Held, that the grantee of the premises could not claim that the lien was thereby released. *Bassett v. Baird*, 17 B. R. 177.

Where sale of goods was made on condition that the title of the vendor was not to pass until the purchase money should be paid, and the goods were delivered to the vendee, Held, that such a stipulation is valid, and if all taint of fraud is disproved a subsale of the goods by the vendee, before payment in full to the vendor, will not affect the title of the original vendor. *In re Binford*, 17 B. R. 353.

Possession of goods does not of itself carry along with it the property in them, nor of itself identify the real owner of them. In Virginia the possession of the fixtures and outfit of a tobacco manufactory was held not to create the presumption that the title to them was in the person using them. *Ibid.*

A charterer of a vessel having purchased supplies of a materialman upon the credit of the vessel, afterward went into bankruptcy and pro-

posed a composition with his creditors, which was accepted. Held, that the lien of the materialman was not thereby discharged, even though he voted in favor of accepting the composition. The "Home," 18 B. R. 557.

Money furnished to a vessel is not a lien unless it be furnished for purpose of paying claims which would themselves be liens. *Ibid.*

A mortgage was not fully made, as against the assignee, until it was recorded, and as it was made to bankrupt's brother to secure a pre-existing debt, and was not recorded until within two months of the filing of the petition, it was void. *Bostwick v. Foster*, 18 B. R. 123.

The bankrupt sold certain bonds belonging to his sister, which were in his hands, and out of the avails paid and took up a mortgage note secured on certain real estate, and kept the balance to his own use. At that time he also owed his sister for a balance of interest he had previously received, and had other bonds of hers which he had already or afterward pledged for his debts. During the following six years he paid her money from time to time, which was charged against the interest received by him upon her bonds, and was not otherwise applied by either. Held, that she was entitled to be treated as if she had held the mortgage from the time he took it up; that the payments should be applied upon the interest and not to the balance of avails of the sale, and that she was entitled to a lien equivalent to a mortgage lien for the payment of the sum found to be due to her after application of such payment. *Dewey v. Kelton*, 18 B. R. 217.

At the advice of one of their creditors, V. sold out his interest in the firm to his partner B., B. agreeing to pay all the firm debts, and giving V. his note for \$300. This was done upon the representation that the creditor would in that event give time. Instead of doing so, he took judgment upon a warrant of attorney held by him, and levied on the goods in B.'s possession. Afterward B. was adjudicated bankrupt on the petition of the firm creditors and V. Another creditor, G., who had obtained a judgment against the firm, then levied upon the goods held by the sheriff under the former levy. The assignee afterward recovered possession of the proceeds of the levy. In a suit by G.'s assignee to establish a lien by virtue of his levy, Held, that the levy having been made after adjudication no lien could attach unless the sale to B. was fraudulent in fact, or by necessary construction of law, so that the goods still remained firm assets. *Russell, Assignee, v. McCord, Assignee*, 17 B. R. 508.

ACT OF 1867, § 5053. No property held by the bankrupt in trust shall pass by the assignment.

Statute revised — March 2, 1867, ch. 176, § 14, 14 Stat. 522.

The trustee meant by this clause can only be a mere naked trustee who holds the legal title but has no beneficial interest in the subject of the trust. A vendor is not such a trustee for the vendee, if all the purchase money has not been paid. *Swepson v. Rouse*, 65 N. C. 34.

A purchase by the bankrupt at a sale of property in which his wife is interested, under a parol promise to hold it for her benefit, does not vest a resulting trust in her so that she can hold it against his assignee. *O'Hara v. Dilworth*, 72 Penn. 397.

To create a resulting trust in case of a purchase of property with the wife's money, it must clearly appear that the money was hers, and that it was paid at the time of the purchase. If it was paid at a subsequent time the trust can not be maintained. *Fisher v. Henderson*, 8 B. R. 175.

When a husband, without any instructions from his wife, uses her money in the purchase of property, and takes the title in his own name, she may, if she so elect, set up a resulting trust to it, or she may treat the transaction as a loan, which she will be presumed to have done unless she takes steps within a reasonable time to set up her trust after she shall have been informed of the disposition of the money. *Ibid*.

The statute applies to all estates where the trusts can be legally established, and is effectual against one claiming under the assignee who is not in the position of a purchaser without notice. Information of a fact coming from a source which ought to be heeded, is sufficient notice. *Faxon v. Folvey*, 110 Mass. 392.

Lands held by the bankrupt under an agreement to reconvey upon the payment of a certain note, is held in trust and does not pass to the assignee. *Ibid*.

If a bankrupt insurance company reinsures in another company, and in case of a loss receives the amount of the reinsurance from the latter, under an express trust to pay it over to the assured, the amount is held in trust and does not pass to the assignee. *Hosmer v. Jewett*, 6 Ben. 208.

Where the identical money collected by a corresponding banker on notes sent to him for collection is not kept separate and distinct from his other money, there is no trust attached to this money in favor of the banker who so remitted the notes for collection. *Bank of Commerce v. Russell*, 2 Dillon, 215.

If a party placed a certain sum of money in the hands of the bankrupt, to be applied to redeem a note and mortgage, and the bankrupt credited the amount on his books and then used it in his business, he can not claim the return of an equal amount from the assignee, but must prove his claim the same as other creditors. *In re Robert Hosie*, 7 B. R. 601; s. c. 6 L. T. B. 89; s. c. 5 Pac. L. R. 193.

A claim for money placed in the hands of the bankrupt to be invested, but which he failed to invest, is not entitled to priority. *In re Janeway*, 4 B. R. 100; s. c. 4 Brewst. 250; s. c. 2 L. T. B. 124.

If the debtor, acting as a factor, sells goods of his principal, and in violation of his instructions takes notes therefor in his own name, and has them discounted, turning over the proceeds to an accommodation indorser to pay the notes upon which he is liable, and such indorser receives the money without notice of any violation of any trust, the fund which may be recovered by the assignees from such indorser solely on the ground that he received a preference by such payment, will not be liable to any trust. The principal's lien was destroyed when the proceeds were received by

such indorser, and the assignee's recovery was simply as a representative of the creditors, and not of the debtor or his principal, and the trust is discharged. *White v. Jones*, 6 B. R. 175.

The trust property must be property that can be followed or distinguished. There must be some ear-mark by which it can be recognized. As, for instance, where goods are sent to a factor to be disposed of, and the factor becomes a bankrupt, and the goods yet in his possession can be distinguished from the general mass of his property, the principal may recover them in specie, and is not obliged to prove his debt under the commission. And even where the bankrupt has sold the goods, if he has kept the money received from the sale in separate bags, the principal has been permitted to claim and hold the money against the assignee. Where, however, the trust property does not remain in specie, but has been made way with by the trustee, the cestui que trust have no longer any specific remedy against any part of his estate in his bankruptcy or insolvency; but they must come in *pari passu* with the other creditors, and prove against the trustee's estate for the amount due them. *In re Janeway*, 4 B. R. 100; s. c. 4 Brewst. 250; s. c. 2 L. T. B. 124; *Wood M. & R. Co. v. Brooke*, 9 B. R. 395; *in re Coan & Ten Broeke Mfg. Co.*, 12 B. R. 203; s. c. 6 Biss. 315.

If the bankrupt, acting as banker and broker, kept the money arising from the brokerage business in a separate bank, a party who gave him bonds to sell may claim payment in full if the money in the bank is more than sufficient to meet all demands against the brokerage department. *Volght v. Lewis*, 14 B. R. 543; s. c. 33 Leg. Int. 402; s. c. 9 C. L. N. 65.

It is not essential to the effective assertion of a beneficial title to a trust fund that the fund shall be susceptible of separate identification. No more is required than proof of substantial identity. Money has no ear-marks by means of which it can be specifically identified. Into whatever form it may be changed, if it can be clearly traced, equity will rescue it from a wrongful appropriation, and give effect to the right of its real owner. An ear-mark is only a means of identification, but is not evidence of ownership. *Ibid*.

If the consignment is a consignment on sale, as distinguished from a consignment on *del credere* guaranty, the consignor can not reserve a special property in the proceeds of the goods as against the assignee of the consignee. *In re Chamberlaines*, 12 B. R. 230.

It is not necessary in order to enable an owner or cestui que trust to claim newly-acquired property that it shall be purchased with the proceeds of the original property. It is sufficient if the newly-acquired property is acquired by direct exchange with it. The real question is, What has taken the place of the property in its original form? Whenever that can be ascertained, the property in the changed form may be claimed by the original owner or cestui que trust. *Cook v. Tullis*, 9 B. R. 433; s. c. 18 Wall. 332.

If the bankrupt deposited the trust funds in bank with his own in his own name, the mode of ascertaining how much belongs to the trust estate,

is to take the deposits and withdrawals in the order of their dates, find out how much of the balance belongs to the trust and how much to the general fund, and divide accordingly. In *re Hapgood*, 14 B. R. 495.

A depositor is not entitled to priority of payment, although the bank having previously suspended payment agreed, at the time of receiving the deposit, to receive special separate deposits, from its customers, for the purpose of continuing business, unless the deposit was kept separate so as to be identified. In *re Mutual Savings Bank*, 15 B. R. 44.

ACTS OF 1867 and 1874, § 5054. The assignee shall immediately give notice of his appointment, by publication at least once a week for three successive weeks in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, and shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded,<sup>1</sup> and the record of such assignment, or a duly certified copy thereof, shall be evidence thereof in all courts.

Statute revised—March 2, 1867, ch. 176, § 14, 14 Stat. 522. Prior Statute—April 4, 1800, ch. 19, § 11, 2 Stat. 24.

**Publication.**—A requirement that a notice shall be published once a week for three successive weeks, is a requirement that it shall be published in every seven days for three successive periods of seven days each; that the interval between any two publications shall not be less than seven days; that the interval between the last publication and any proceeding dependent upon the publication shall be not less than seven days; and that the publications shall be three in number. In *re Bellamy*, 1 B. R. 64; s. c. 1 Ben. 390; s. c. 1 L. T. B. 22.

The publication by the assignee of his appointment is not essential to the regularity of the proceedings. This provision of the act is merely directory to the assignee, and not intended so much for creditors as for persons owing debts to, or otherwise having business with, the estate. In *re Littlefield*, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164.

**Record.**—The purpose in requiring the assignee to cause the assignment to be recorded is that every purchaser of land at an assignee's sale may have recourse to a certified copy of such registry, as a link in his chain of title in any suit he may bring for the possession, or in any suit in respect to the property which he, or his heirs, or others claiming under him, may desire to bring thereafter. Registration is necessary to the safety of such purchaser; for there is but one original assignment, and

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<sup>1</sup> So amended by act of February 18, ch. 80, 1875, 18 Stat. 320.

that is filed in the office of the clerk of the district court. When this law is observed, the loss of the original would work no loss or inconvenience to the purchaser or others claiming under him; for they could have recourse to a certified copy from the registry, which the act declares shall be evidence thereof in all courts. The object in requiring the assignment to be recorded is not to vest a title in the assignee, for he has title though the assignment may never be recorded. The assignee may use it as evidence of his title in the courts, though the same may not have been recorded. *In re Neale*, 3 B. R. 177; s. c. 1 L. T. B. 295; *Holbrook v. Coney*, 25 Ill. 543.

As the county records should contain a complete registry of all instruments on which transfers of title depend, it was eminently proper for the protection of all concerned, that the assignment in bankruptcy should be there recorded; an instrument in writing, which though not conforming in the usual particulars with conveyances from one party to another, or even with sheriff's deeds, yet by the paramount law is a complete transfer and conveyance of all the bankrupt's real and equitable interest, with the exceptions named in the act. That instrument is not signed by the bankrupt, or acknowledged by him, but is signed by the register or judge. When the assignment is recorded, the record, or a duly certified copy thereof, is made evidence of the assignment in all courts, notwithstanding very different rules as to instruments affecting realty may obtain under State laws. It is to be remarked, that the clause directing the assignment to be recorded, gives no further effect thereto than that just stated. The assignment itself passes the property with relation back to the commencement of the proceedings, and all subsequent purchasers are affected accordingly, whether they purchased before assignment actually made or afterward, and consequently the recording of the assignment is not essential to the validity of the transfer, and is not designed to operate as under State registry acts. A purchaser from the bankrupt, after the commencement of proceedings, although he has no notice thereof, will take no title. The question of notice can not arise. The purchase being of what the bankrupt debtor had at the time, and all his interest having passed to the assignee previously, the purchaser acquires no title as against the assignee. *Davis v. Anderson*, 6 B. R. 145; *Phillips v. Helmbold*, 26 N. J. Eq. 202.

A copy from the record of the assignee's deed is admissible in evidence to prove registration. *Oakey v. Corry*, 10 La. An. 502.

When the assignment has been recorded, and it is apparent of record at the time of a sale on execution, that the judgment debtor has no title to or interest in the property sold, the purchaser at the sheriff's sale acquires no title. *Stuart v. Hines*, 6 B. R. 416; s. c. 33 Iowa, 60; s. c. 5 L. T. B. 46.

The purchaser at a sale of real estate by the assignee of a bankrupt, will hold the title against a prior unrecorded deed of the bankrupt. *Holbrook v. Dickinson*, 56 Ill. 489.

A copy from the State records of an assignment not acknowledged according to the State laws, is not admissible in evidence. *Zeigler v. Shomo*, 78 Penn. 357.

The title of a party who claims under the assignee will prevail against a party who obtained a conveyance from the bankrupt after the commencement of the proceedings in bankruptcy with notice of such title, although the assignment to the assignee was not acknowledged and recorded according to the laws of the State where the land was situated. *Brady v. Otis*, 14 B. R. 345; s. c. 40 Iowa, 97.

§ 5055. The assignee shall demand and receive, from all persons holding the same, all the estate assigned or intended to be assigned.

Statute revised — March 2, 1867, ch. 176, § 15, 14 Stat. 524.

If the assignee is satisfied that property taken by him does not belong to the bankrupt, he should surrender it without delay to the owners. In *re Noakes*, 1 B. R. 592.

ACT OF 1867, § 5056. No person shall be entitled to maintain an action against an assignee in bankruptcy, for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so.

Statute revised — March 2, 1867, ch. 176, § 14, 14 Stat. 522. Prior Statute — April 4, 1800, ch. 19, § 49, 2 Stat. 34.

This section covers all the acts which the assignee honestly does in the discharge of the trust which the law casts upon him. The statute requires a specific notice. The mere presentation of a bill for services rendered is not sufficient. *Hallam v. Maxwell*, 2 Cinn. 136.

This section does not apply to an action of replevin to recover property which the assignee took from the possession of the plaintiff. *Leighton v. Harwood*, 12 B. R. 360; s. c. 111 Mass. 67.

No notice need be given to an assignee before bringing a bill to enjoin a judgment recovered by the bankrupt by his fraudulent contract. *Weakley v. Miller*, 1 Tenn. Ch. 523.

The omission to give notice to an assignee can only be taken advantage of by a plea in abatement. *Ibid.*

By appearing and filing a plea the assignee waives the want of notice before bringing the suit. *Rowe v. Page*, 13 B. R. 366; s. c. 54 N. H. 190.

ACTS OF 1867 and 1874, § 5057. No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the



cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed.

Statutes revised — March 2, 1867, ch. 176, § 2, 14 Stat. 518. Prior Statute — Aug. 19, 1841, ch. 9, § 8, 5 Stat. 446.

A suit is a prosecution of some demand in a court of justice. *Wilt v. Stickney*, 15 B. R. 23; s. c. 13 Pac. L. R. 61.

The cause of action accrues to the assignee on the execution of the assignment, and the limitation begins to run from that time. *Lathrop v. Drake*, 30 Leg. Int. 141.

On all matured claims and demands the cause of action accrues to the assignee at the date of the assignment; on all others from their maturity, or at the time when an action will lie, and he must sue from these dates respectively. *Norton v. De la Villebeuve*, 13 B. R. 304; s. c. 1 Woods, 163.

This section applies equally to courts of equity and courts of law. *Bailey v. Wier*, 12 B. R. 24; s. c. 21 Wall. 342.

The limitation applies when the suit is brought in a State court as well as when it is brought in a Federal court. *Comegys v. McCord*, 11 Ala. 932; *Archer v. Duval*, 1 Fla. 219.

A suit is the lawful demand of a right at law or in equity, and it matters not what form is given to it by the legislative power, it still remains a suit in the sense of the definition, although it retains none of the features by which proceedings at law or in equity have been distinguished. *Union Canal Co. v. Woodside*, 11 Penn. 176.

The limitation applies only to suits growing out of disputes in respect to property and rights of property of the bankrupt, which come to the hands of the assignee, and to which adverse claims existed while in the hands of the bankrupt and before assignment. These disputes of claims affect the assets of the bankrupt, and an adjustment of them, either by compromise or suit, is indispensable to a settlement and distribution of the estate among the creditors. A short bar by limitation to suits brought either by the assignee or the adverse claimant, furnishes a fit and appropriate remedy against delay where compromise is impracticable. In *re Frederick J. Conant*, 5 Blatch. 54; *Stevens v. Hauser*, 39 N. Y. 302; s. c. 1 Robt. 50.

It is entirely within the power of Congress, in establishing a uniform system of bankruptcy, to provide a uniform rule on the subject of actions, whether by or against an assignee in bankruptcy; and such rule must of necessity supersede all State legislation on the subject. If the right of action asserted by the assignee is not actually barred at the time of his appointment — a case expressly saved by the proviso — he has two years, and only two years from the time the cause of action accrued for or against such assignee. This is to apply, by the express words of the section, to actions brought "in any court whatsoever;" therefore in any court, State or Federal. *Pelper v. Harmer*, 5 B. R. 252; s. c. 8 Phila. 100.

This is a separate and independent provision, and has no connection with any State statute on the subject. It may extend or it may contract

the time provided in the State statute of limitations. Thus if at the time of the appointment of the assignee but a few days remain of the time necessary to complete the bar, the time will be extended; or, if the statute has just commenced running, and under the State law would have ten years to run, it would be complete within two years. *Frelander v. Holloman*, 9 B. R. 331.

A petition to a court, to order a distribution of a fund lodged in its registry, is not an action or suit within the meaning of this clause. *In re Masterson*, 4 B. R. 553.

The limitation does not extend to an application by an assignee for money brought into a State court in proceedings instituted before the commencement of the proceedings in bankruptcy. *Phillips v. Helmbold*, 26 N. J. Eq. 202.

When the defendant only disputes the amount, there is no controversy in regard to the interests and rights touching the property. A voluntary assignor, under a void assignment, can not have or claim any adverse interest as against the assignee in bankruptcy. A claim against the bankrupt's estate, for services rendered to the bankrupt, is not within the statute. *In re Krogman*, 5 B. R. 116.

A venire to assess damages for land taken by a corporation is a suit at law. *Union Canal Co. v. Woodside*, 11 Penn. 176.

A claim for damages for the taking of the land of the bankrupt by a corporation is not barred, for the corporation is not an adverse claimant. *Ibid*.

The omission to bring the suit for more than two years after the cause of action accrued may be a good defense, if properly pleaded, but does not go to the jurisdiction of the court. *Chemung Canal Bank v. Judson*, 8 N. Y. 254.

The title of a party who purchases at a sale under a proceeding to foreclose a mortgage which was instituted after the commencement of the proceedings in bankruptcy, without making the assignee a party thereto, will not be rendered valid by the lapse of two years, unless he takes actual possession of the premises and occupies them in such a manner that the assignee must be presumed to have had notice thereof, or gives some notice, actual or constructive, to the assignee that he claims an adverse interest. *Price v. Phillips*, 3 Robt. 448.

A mortgage does not of itself constitute an adverse claim, for it is simply a lien or charge on the land, and does not confer on the mortgagee any estate in the land. *Price v. Phillips*, 3 Robt. 448. *Vide Cleveland v. Boerum*, 24 N. Y. 613; s. c. 23 Barb. 201; s. c. 27 Barb. 252.

An action on judgment is barred by the lapse of two years. *Archer v. Duval*, 1 Fla. 219.

The limitation applies, although the suit is brought in the name of the assignee for the use of a third person. *Pike v. Lowell*, 32 Me. 245.

If a party buys a judgment against the bankrupt, and purchases certain land at a sale, under an execution issued thereon, under a parol agreement that out of the proceeds he shall retain a debt due to him, and the money used to buy the judgment, and then pay the balance to the bankrupt, the

statute begins to run from the time when he receives the proceeds. *Hyde v. Ely*, 8 Pac. L. R. 147.

If the assignee is not made a party to a pending action until more than two years after his appointment, his claim will be barred, for the amendment by which he is made a party will not relate back, and thereby make him a party ab initio, and thereby defeat the limitation. *Cogdell v. Exum*, 10 B. R. 327; s. c. 69 N. C. 464.

A bill to set aside a fraudulent conveyance will be defeated by a plea of the statute of limitations, if more than two years have elapsed since the appointment of the assignee. *Freeland v. Holloman*, 9 B. R. 331; *Botts v. Patton*, 10 B. Mon. 452.

If a mortgagee enforces his lien in a State court after the commencement of proceedings in bankruptcy, the assignee has two years from the time of the sale in which he can institute proceedings to set it aside. *Phelps v. Sellick*, 8 B. R. 390.

This clause does not apply to a proceeding to set aside a sale made under a levy upon land, after the filing of a petition to enforce a judgment lien. *Davis v. Anderson*, 6 B. R. 145.

A suit merely to collect a debt, or enforce the payment of money due on a contract, does not fall within the provisions of this clause. The plaintiff does not claim an interest adverse to the defendant in or touching any property, or right of property, of the bankrupt, transferable to or vested in the plaintiff as assignee; nor does the defendant claim any interest adverse to the plaintiff in or touching any such property, or right of property. The defendant claims no ownership of or title to the debt or contract which the plaintiff seeks to enforce against the defendant; nor does the plaintiff claim any ownership of or title to any specific property, or right of property, as having passed to him by virtue of his appointment, which the defendant also claims to own; nor does the defendant claim any ownership of or title to any specific property which belonged to the bankrupt. The limitation of two years applies only to such controversies. Moreover, it applies only to controversies of which the circuit court of the district has concurrent jurisdiction with the district court of the same district. *Sedgwick v. Casey*, 4 B. R. 496; s. c. 3 C. L. N. 177; *Smith v. Crawford*, 9 B. R. 38; s. c. 6 Ben. 497; *Carr v. Lord*, 29 Me. 51. Contra, *Harris v. Collins*, 13 Ala. 388; *Norton v. Barker*, 1 W. N. 29.

The limitation does not relate to an action by a purchaser to recover a debt which was sold as a part of the bankrupt's assets. *Judson v. Lathrop*, 6 La. An. 587.

This section does not apply to sales or conveyances, and the assignee may convey any portion of the estate after even the lapse of two years. *Warren v. Miller*, 38 Me. 108; *Holbrook v. Brenner*, 31 Ill. 501.

If the claim of the assignee is barred by the lapse of two years, he can not, by a transfer to another, confer a right of action which he has suffered to expire, and thus avoid the limitations. *Cleveland v. Boerum*, 23 Barb. 201; s. c. 27 Barb. 252; s. c. 24 N. Y. 613.

The limitation has no application to suits which are pending at the time of the commencement of the proceedings in bankruptcy. *Kane v. Pilcher*, 7 B. Mon. 651.

The limitation has no reference to suits growing out of the dealings of the assignee with the estate after it comes into his hands. These are matters for which he may be made personally responsible, and no reason existed for changing the general period of limitations any more than in the case of any other trustee dealing with trust property. *In re Frederick J. Conant*, 5 Blatch. 54.

The limitation does not apply to a party who takes possession of the property after the commencement of the proceedings in bankruptcy. *Stevens v. Hauser*, 39 N. Y. 302; s. c. 1 Robt. 50.

If an assignee, after instituting a suit, dies, and the new assignee institutes another suit instead of continuing the prior suit, the statute runs to the time of the institution of the second suit. *Richards v. Maryland Ins. Co.*, 8 Cranch. 84.

The limitation provided by this section does not apply to a proceeding to review a decision of the district court. *Wilt v. Stickney*, 15 B. R. 23; s. c. 13 Pac. L. R. 61.

An action by an assignee of a bank to recover money paid by persons pretending to act as commissioners of the bank to their attorney, before the appointment of the assignee, is barred, unless it is brought within two years after that time. *Miltenerberger v. Phillips*, 2 Woods, 115.

The limitation can not affect any suit, the cause of which occurred from an adverse possession taken after the bankruptcy, until the expiration of two years from the taking of such possession. *Banks v. Ogden*, 2 Wall. 58.

The failure of the assignee to sue and recover a distributive share of an estate of one of the bankrupt's children, to which the bankrupt was entitled, does not confer any right on the bankrupt to sue for it. *Deadrick v. Armour*, 10 Humph. 588.

If the claim of the assignee is barred by the limitation, the creditors may file a bill to set aside a fraudulent conveyance made by the bankrupt before the commencement of the proceedings in bankruptcy. *Tichenor v. Allen*, 13 Gratt. 15; *Dewey v. Moyer*, 16 B. R. 1; s. c. 16 N. Y. Supr. 473.

A bill to set aside a judgment recovered by the assignee on the ground of fraud is barred unless it is brought within two years from the time of the discovery of the fraud. *Clark v. Hackett*, 1 Cliff. 269.

When there has been no negligence or laches on the part of the plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him. *Bailey v. Wier*, 12 B. R. 24; s. c. 21 Wall. 342; *Carr v. Hilton*, 1 Curt. 230; *Pritchard v. Chandler*, 2 Curt. 488.

The limitation bars the action, although the assignee was ignorant of his rights, for the court can not engraft an exception on the statute. *Norton v. De la Villebeuve*, 13 B. R. 304; s. c. 1 Woods, 163.

This rule applies to suits at law as well as in equity. *Bailey v. Wier*, 12 B. R. 24; s. c. 21 Wall. 342.

The statute begins to run from the time when the assignee could have discovered the fraud by the use of due diligence. *Andrews v. Dole*, 11 B. R. 352.

As the adverse party is under no duty to make known the cause of action to the assignee, something more than silence on his part must be proved in order to sustain a charge of fraudulent concealment. *Pritchard v. Chandler*, 2 Curt. 488.

If the statute once begins to run, it must continue until the completion of the bar, and to prevent it from beginning to run, the fraudulent concealment must exist at the moment when the assignee's title accrued. *Ibid.*

A bill which states a case of secret fraud does sufficiently aver that the cause of action was fraudulently concealed, for a secret or concealed fraud is a fraudulent concealment of the cause of action. *Carr v. Hilton*, 1 Curt. 230.

The interest adversely claimed, which the statute protects, is an interest in a claimant other than the bankrupt. *Clark v. Clark*, 17 How. 315; *Pickett v. McGavick*, 14 B. R. 236.

If the bankrupt, at an assignee's sale, fraudulently purchases a claim against a foreign government, the cause of action does not accrue until he gets possession of the money. *Clark v. Clark*, 17 How. 315.

A bill, which is in theory and in fact an original bill, can not, for the purpose of avoiding the limitation, be treated as an amendment of a prior bill which was dismissed. *Clark v. Hackett*, 1 Cliff. 269.

Where a court of equity allows a respondent to amend his answer so as to set up the statute of limitations, the amendment must afterward be deemed to have been duly and properly allowed. *Ibid.*

A casual averment in an answer to a petition to the effect that the assignee has lain by for a period of over two years without notifying the respondent that he would have to account for certain rents, is not a sufficient plea of the statute. *Hall v. Scovel*, 10 B. R. 295.

If the declaration shows that the cause of action is barred by the statute of limitations, the defendant may demur. *Harris v. Collins*, 13 Ala. 388.

§ 5058. [This section is superseded by act of June 22, 1874, ch. 390, § 4, 18 Stat. 178.]

ACT OF 1898, CH. 7, § 61. **Depositories for Money.**—(a) Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

ACT OF 1898, CH. 5, § 47. **Duties of Trustees.**—(a) Trustees shall respectively (1) account for and pay over to the estates under

their control all interest received by them upon property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited.

Acts of 1867 and 1874, § 5059. The assignee shall, as soon as may be, after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be liable to be taken as his property or for the payment of his debts.

Statutes revised — March 2, 1867, ch. 176, § 17, 14 Stat. 524. Prior Statutes — April 4, 1800, ch. 19, § 54, 2 Stat. 34; Aug. 19, 1841, ch. 9, § 9, 5 Stat. 447.

If the assignee does not deposit the money in bank within the time fixed by the statute, he is chargeable with interest if he has not a reasonable excuse for not complying with the statute. In re Stillman Thorp, 4 N. Y. Leg. Obs. 377.

Act of 1867, § 5060. When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or register, or may authorize it to be deposited in any convenient bank upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon.

Statute revised — March 2, 1867, ch. 176, § 17, 14 Stat. 524.

Act of 1898, CH. 4, § 26. **Arbitration of Controversies.**— (a) The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

(b) Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

(c) The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

ACT OF 1867, § 5061. The assignee, under the direction of the court, may submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators, to be chosen by him and the other party to the controversy, and under such direction may compound and settle any such controversy, by agreement with the other party, as he thinks proper and most for the interest of the creditors.

Statute revised — March 2, 1867, ch. 176, § 14, 14 Stat. 524. Prior Statutes — April 4, 1800, ch. 19, § 43, 2 Stat. 33; Aug. 19, 1841, ch. 9, § 11, 5 Stat. 447.

The assignee must apply to the court by petition, and not to the register. *In re John Graves*, 1 B. R. 237; s. c. 2 Ben. 100.

An order authorizing the assignee to compromise any and all debts due the bankrupt's estate with the consent of certain persons selected by the creditors, is not authorized in this section. *In re Dibblee et al.*, 3 B. R. 12; s. c. 3 Ben. 354.

This provision does not apply where there is no suit or demand against the estate, or controversy as to a debt due to it. *In re Franklin Fund Saving Society*, 31 Leg. Int. 173.

When the assignee applies to the court under the provisions of this section, he should take unequivocally upon himself the direct responsibility of recommending the proposed arrangement as in his opinion a proper one. *Ibid.*

If an assignee attempts to arbitrate or compromise without pursuing the course prescribed by the statute, the agreement will be binding on him in his individual and not his representative capacity. *Blight v. Ashley*, Pet. C. C. 15.

The act of one assignee will not bind a coassignee without his previous authority or subsequent ratification, especially when the act is not within the scope of their authority, for they act under delegated authority. *Ibid.*

It is not competent for a creditor and a bankrupt to submit to arbitration the question of the amount due the creditor from the bankrupt's estate. *In re Ford & Co.*, 18 B. R. 426.

ACT OF 1898, CH. 4, § 27. **Compromises.**— (a) The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

Bankrupts prior to filing of their voluntary petition paid their attorneys \$150, and assigned them a large amount of uncollected claims to secure them, as alleged, for services rendered and to be rendered in bankruptcy

proceedings. Some of these claims were afterward collected by the attorneys. Action was brought by assignees to recover said assigned claims and the money collected. On application made by assignee, after issue joined, to compound the claims by accepting from the attorneys the claims still uncollected, and releasing them from all claims on those collected: Held, not a proper case for compromise of disputed claim under General Order No. 20, (Bankruptcy Act of 1867); *In re Rowe et al.*, 18 B. R. 429.

ACT OF 1867, § 5062. The assignee shall sell all such unincumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors; but, upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place and manner of sale as will, in its opinion, prove to the interest of the creditors.

Statute revised — March 2, 1867, ch. 176, § 15, 14 Stat. 524. Prior Statutes — April 4, 1800, ch. 19, §§ 44, 59, 2 Stat. 33, 35; Aug. 19, 1841, ch. 9, § 9, 5 Stat. 447.

The State laws in regard to the transfer of estates are subject to the plenary power of Congress over bankruptcy, and there can be no doubt of the complete force of the bankruptcy law to dispose of the bankrupt's property for all the purposes designated or implied by it. The rights of the assignee are broad enough to dispose of all the property, if such disposition be needed. *Stevens v. Earles*, 25 Mich. 40.

The assignee has the authority to sell unincumbered assets without an order from court. *In re White & May*, 1 B. R. 218; s. c. 2 Ben. 85; *Mims v. Swartz*, 10 B. R. 305; s. c. 37 Tex. 17.

A State law prohibiting sales of land in the possession of an adverse claimant does not apply to a sale by an assignee, for that is a judicial sale. *Stevens v. Hauser*, 39 N. Y. 302; s. c. 1 Robt. 50; *Stevens v. Palmer*, 10 Bosw. 6.

An assignee in one State may sell real estate lying in another State. *Oakey v. Corry*, 10 La. An. 502.

The assignee may be vested with a discretion in regard to the time and manner of making a sale. *Holbrook v. Coney*, 25 Ill. 543.

When the authority of the assignee, under an order to sell, is limited to the property set forth in the schedule, he can not convey any other property. *Warren v. Homestead*, 33 Me. 256.

The assignee is limited in his transactions to the powers and authority conferred upon him by the bankruptcy act, and by the orders of the court. Anything he may do outside, or in conflict with, or in violation of such powers and authority, is null and void. Under an order to sell for the highest price he can obtain, he must accept the highest bid, although he has previously agreed, without consideration, to sell to another person for a certain price, and to wait for an answer for a certain time, which period has not expired, at the time of receiving a better bid. *In re Ryan & Griffin*, 6 B. R. 235.



If a lease made by the assignee is not authorized or sanctioned by the court, those who are in possession under it can claim no rights as against such order as the court may make concerning the property. *In re Samuel Schapter*, 9 B. R. 324.

The court may authorize a private sale of land so far as the authorization may be required to assure the title to the purchaser, but not so as to exempt the assignee from responsibility to creditors for negligence, if any, in obtaining the best price for the property. *In re Knott, Rooney & Dibest*, 1 W. N. 52.

If a sale is fairly made, and the bids are understood by the auctioneer and the bystanders, it will be valid, although the assignee is present and in consequence of his negligence and inattention fails to understand the terms thereof. *Ives v. Tregent*, 14 B. R. 60; s. c. 29 Mich. 390.

If an assignee makes a sale of property, but refuses to deliver the possession thereof, he may be sued at law if the sale has never been brought to the attention of the bankruptcy court nor in any manner acted on by it. *Ibid.*

The solicitor of the assignee can not purchase at a sale made by the assignee, for he is not the personal counsel of the assignee, but of the assignee as the representative of the creditors. *Citizens' Bank v. Ober*, 13 B. R. 328; s. c. 1 Woods, 80.

An agreement by a party who expects to become a purchaser at an assignee's sale, to sell the property to the assignee's solicitor for a fixed price, without reference to the amount that may be bid therefor, does not render the sale void. *Ibid.*

When the terms are cash on the day of sale, a party who expects to purchase may agree with another party, that in case he becomes purchaser, he will sell the property to him at a named price on terms of credit, especially when he has no notice or knowledge that the party proposing to buy, is prepared to pay cash, and is ready to bid and able to make his bid good. *Ibid.*

The bankrupt may purchase property at an assignee's sale. *Arnold v. Leonard*, 20 Miss. 258; *Phelps v. McDonald*, 2 McArthur, 375.

The district court has the power to set aside a sale made by an assignee. When a portion of the creditors unite in a purchase for the joint benefit of themselves, it ought to appear that the sale has been so conducted that no prejudice has come to other creditors. It is not sufficient that the technical formal requisites to a regular sale have been complied with, when there has been an improper combination between the assignee and the purchaser, which has resulted in a sacrifice of the property. A creditor, whose claim is in dispute, may file a petition to set aside a sale. *In re Troy Woolen Co.*, 4 B. R. 629; s. c. 8 Blatch. 465.

A sale of real estate at public auction by the assignee is subject to the approval of the court, which has a discretion to refuse to confirm it for mere inadequacy of price. It is not necessary that there should be fraud or such gross inadequacy of price as to be evidence of fraud. *In re O'Fallon*, 2 Dillon, 548.

A sale of real estate is not confirmed by the court, but the purchaser is left to establish his title whenever the occasion may arise. *In re H. O. Alden*, 16 B. R. 39; s. c. 9 C. L. N. 346.

If the right to property and the evidence to establish it are concealed from the assignee and the creditors, so that the assets are sold for a nominal amount to the bankrupt himself, then the purchase is fraudulent and may be set aside. *Clark v. Clark*, 17 How. 315; *Booth v. Clark*, 17 How. 322.

The court will not direct the repayment of the consideration where the sale is void, unless it appears that the purchaser acted in good faith and under the belief that the assignee in making the sale was exercising the powers of his office in a right and fair manner. *In re Jacob H. Mott*, 1 B. R. 9.

A purchaser is not bound by a subsequent decree for a sale of the premises unless he is a party to the proceedings, although it purports to set aside the previous sale to him. *Holbrook v. Brenner*, 31 Ill. 501.

A knowledge of the bankruptcy does not necessarily imply any knowledge that the assignee is about to sell property belonging to another, and will not estop the owner from asserting his title against a purchaser from the assignee. *Davis v. Fairclough*, 63 Mo. 61.

If the vendor and the bankrupt, before the commencement of the proceedings in bankruptcy, agreed that the sale should be rescinded and the money paid thereon forfeited, the vendor will have a better title than the purchaser from the assignee. *Ibid.*

Where an individual partner is adjudged bankrupt, the statute of limitations runs from the date of the adjudication against any purchaser of a chose in action at a sale by the assignee. *Blackwell v. Claywell*, 15 B. R. 300; s. c. 75 N. C. 213.

The purchaser at an assignee's sale is entitled to the rents from the day of sale. *Hall v. Scovel*, 10 B. R. 295.

A purchaser from an assignee takes no higher right than the bankrupt himself had. *Anderson v. Miller*, 15 Miss. 586; *Baker v. Vining*, 30 Me. 121.

The statute does not enable the assignee to convey a legal title where, by the rules of law, the bankrupt himself could not. The sale gives to the purchaser no other title than a sale by the bankrupt himself before his bankruptcy would confer. If the bankrupt could not give a legal title by his sale, the assignee can not. *Camaek v. Bisquay*, 18 Ala. 286.

Such a sale does not divest the dower of the wife of the party from whom the bankrupt bought the land. *Speake v. Kinard*, 4 Rich. (N. S.) 54.

Where the bankrupt, prior to the commencement of the proceedings in bankruptcy, executed a deed of trust to secure an indebtedness with a power to sell, the purchaser will not take the legal title, but merely the surplus that may remain after the debt is paid. *Lyall v. Miller*, 6 McLean, 482.

If a privilege without registry is good against the bankrupt, it is also good against the purchaser. *McKiernan v. Fletcher*, 2 La. An. 438.

The purchaser of a chose in action from the assignee takes it subject to all the equities existing against it in the hands of the bankrupt. *Strong v. Clawson*, 10 Ill. 346.

A purchaser of a note at an assignee's sale takes it subject to a prior lawful transfer thereof by the bankrupt. *Converse v. Sorley*, 39 Tex. 515.

A person who purchases from the assignee can not impeach a prior conveyance for fraud and have it set aside. *Reavis v. Garner*, 12 Ala. 661.

A purchaser who buys all the interest of the assignee in certain property may impeach a prior conveyance for fraud. *Dwinel v. Perley*, 32 Me. 197; *Badger v. Story*, 16 N. H. 168.

A sale of all the bankrupt's rights of property gives the purchaser all the rights of action which the assignee could exercise in respect of such property, and he may impeach a prior fraudulent conveyance. *Williams v. Vermeule*, 4 Sandf. Ch. 388.

A purchaser of the mere right which the bankrupt had in the premises at the commencement of the proceedings in bankruptcy, as distinguished from the right of the assignee, does not represent creditors. *Baker v. Vining*, 30 Me. 121.

If the property is sold subject to incumbrances, the purchaser takes it subject only to legal and valid incumbrances, and may impeach an incumbrance for fraud. *Murray v. Jones*, 50 Ga. 109.

A sale of a lease, good will, and fixtures will only pass such fixtures as are affixed in some way to the building, and their accessories. If any of these are subsequently sold, the first purchaser may claim the proceeds. *In re Hitchings*, 4 B. R. 384.

He who purchases property at the sale of an assignee acquires the possession legally, and the owner, if there is a better title, can not recover the property by a possessory warrant. He must bring trover, or other proper action, to try the title. *Bryan v. Whitsett*, 39 Ga. 715.

The statutory right to redeem property sold under a deed of trust passes to the assignee, and may be sold by him. But the purchaser at the sale under the deed of trust is not deprived of any of his rights, and may demand a repayment of the advance, as well as the original bid, as a condition precedent to the right of redemption. *Toombs v. Palmer*, 4 Helsk. 331.

If a purchaser who claims under a sale by the assignee fails to establish the regularity of the proceedings in bankruptcy, he may rely upon a subsequent mortgage made by the bankrupt. *Den v. Wright*, Pet. C. C. 64.

The sale and a compliance with its terms vest an equitable title in the purchaser, but the conveyance alone passes the legal title. Consequently the purchaser can not sustain an action of ejectment by proof of a deed made after the institution of the suit, although the sale was made before that time. *Joy v. Berdell*, 25 Ill. 537.

If the purchaser buys only the mortgage note, without taking an assignment of the mortgage, he can not maintain an action at law to recover the land. *Warren v. Homestead*, 33 Me. 256.

A debtor to the estate can not, in an action by a purchaser of the claim, set off a debt obtained by him after the commencement of the proceedings in bankruptcy. *Judson v. Lathrop*, 6 La. An. 587.

A debtor to a bankrupt firm can not, in an action by a purchaser, set off a debt due to him by one of the bankrupts. *Ibid.*

A claim against the bankrupt before his bankruptcy can not be set off against an indebtedness for goods purchased from the assignee. *Moran v. Bogert*, 14 B. R. 393; s. c. 16 Abb. Pr. (N. S.) 303; s. c. 10 N. Y. Supr. 603.

A claim against the bankrupt's estate for a benefit conferred upon it, may be set off against a liability for goods purchased from the assignee. *Ibid.*

An objection that purchaser at a sale by the assignee was the attorney for assignee, and as such was incapable of purchasing, can not be raised in a collateral action; it must be made in the bankruptcy court. *Spilman v. Johnson*, 16 B. R. 145.

Where claim is marked in schedule as worthless, the validity of a sale of the assets, including such claim, is not affected by its afterward becoming valuable. *Phelps, Assignee, v. McDonald*, 16 B. R. 481.

Sale of stock to a creditor who holds it as collateral security for \$10 per share, when it was worth \$25 per share, will be set aside for inadequacy of price. *In re Bousfield & Poole*, 16 B. R. 481.

Validity of sale by assignee in bankruptcy, can not be questioned in a collateral proceeding in a State court. *Steele v. Moody*, 16 B. R. 558.

The defendant in an action brought by the purchaser to recover the property, can not impeach the proceedings in bankruptcy for defects or irregularities. *Stevens v. Hauser*, 39 N. Y. 302; s. c. 1 Robt. 50.

The sale of the property by the assignee for a nominal consideration, is an objection that can not be raised in an action by the purchaser to recover the property. *Ibid.*

A purchaser is not liable for any injury caused by the negligence of the assignee in the management of the property, after the sale and before the ratification of the sale and conveyance of the property. *Metz v. Buffalo, Corry & P. R. R. Co.*, 12 B. R. 559; s. c. 58 N. Y. 61.

A recital in a deed by an assignee that a person was declared bankrupt, that the grantor was appointed his assignee, and that he was directed to sell the property, is not evidence of the facts recited against a person claiming the property otherwise than through or under the grantor. *Warren v. Syme*, 7 W. Va. 474.

The appointment of the assignee may be established by proof that he acted as assignee, without producing the record of his appointment, in a controversy between the purchaser and third parties. *Arnold v. Leonard*, 20 Miss. 258.

Where the plaintiff, in an action of ejectment, claims title under an assignee, he may prove the proceedings in bankruptcy by parol evidence if the records are destroyed. *Thomas v. Cruttenden*, 4 Cranch C. C. 71.

ACT OF 1898, CH. 7, § 70. **Appraisement.**—(b) All real and personal property belonging to bankrupt estates shall be appraised by three dis-interested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practi-

cable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

ACT OF 1874, § 5062A (June 22, 1874, ch. 390, § 1, 18 Stat. 178). That the court may, in its discretion, on sufficient cause shown, and upon notice and hearing, direct the receiver or assignee to take possession of the property, and carry on the business of the debtor, or any part thereof, under the direction of the court, when in its judgment, the interest of the estate as well as of the creditors will be promoted thereby, but not for a period exceeding nine months from the time the debtor shall have been declared a bankrupt. *Provided*, that such order shall not be made until the court shall be satisfied that it is approved by a majority in value of the creditors.

The court may authorize the assignee to spend money to put property into a salable condition. The assignee should endeavor to settle and liquidate the estate as rapidly as possible, and to the best advantage. It is no part of his ordinary right or duty to carry on a trade. But if, in a reasonable time and at a reasonable expense, he can make property salable which is not so in the condition in which he finds it, he may do so. He will not be allowed to do so, however, unless it is clearly shown that he can make such a bargain for the necessary work as will almost to a moral certainty insure the creditors against loss, and insure them a large gain within a reasonable time. *Foster v. Ames*, 2 B. R. 455; *s. c. Lowell*, 313.

If a receiver institutes a suit to recover the value of property sold by the bankrupt in fraud of the bankruptcy law prior to the commencement of proceedings in bankruptcy, the assignee will not be admitted to prosecute the suit. *Lansing v. Manton*, 14 B. R. 127.

A receiver can not maintain an action to recover the value of property sold by the bankrupt in fraud of the bankruptcy law prior to the commencement of proceedings in bankruptcy. *Ibid*.

ACT OF 1874, § 5062B (22 June, 1874, ch. 390, § 4, 18 Stat. 178). That, unless otherwise ordered by the court, the assignee shall sell the property of the bankrupt, whether real or personal, at public auction, in such parts or parcels, and at such times and places, as shall be best calculated to produce the greatest amount with the least expense. All notices of public sales under this act by any assignee or officer of the court shall be published once a week for three consecutive weeks in the newspaper or newspapers to be designated by the judge, which, in his opinion, shall be best calculated to give general notice of the sale. And the court, on the application of any party in interest, shall have complete supervisory power over

such sales, including the power to set aside the same and to order a resale, so that the property sold shall realize the largest sum. And the court may, in its discretion, order any real estate of the bankrupt, or any part thereof, to be sold for one-fourth cash at the time of sale, and the residue within eighteen months, in such installments as the court may direct, bearing interest at the rate of seven per centum per annum, and secured by proper mortgage or lien upon the property so sold. And it shall be the duty of every assignee to keep a regular account of all moneys received or expended by him as such assignee, to which account every creditor shall, at reasonable times, have free access. If any assignee shall fail or neglect to well and faithfully discharge his duties in the sale or disposition of property as above contemplated, it shall be the duty of the court to remove such assignee, and he shall forfeit all fees and emoluments to which he might be entitled in connection with such sale. And if any assignee shall in any manner, in violation of his duty aforesaid, unfairly or wrongfully sell, or dispose of, or in any manner fraudulently or corruptly combine, conspire, or agree with any person or persons, with intent to unfairly or wrongfully sell or dispose of the property committed to his charge, he shall, upon proof thereof, be removed, and forfeit all fees or other compensation for any and all services in connection with such bankrupt's estate, and upon conviction thereof before any court of competent jurisdiction, shall be liable to a fine of not more than ten thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both fine and imprisonment, at the discretion of the court. And any person so combining, conspiring, or agreeing with such assignee for the purpose aforesaid, shall, upon conviction, be liable to a like punishment. That the assignee shall report, under oath, to the court, at least as often as once in three months, the condition of the estate in his charge, and the state of his accounts in detail, and at all other times when the court, on motion or otherwise, shall so order. And on any settlement of the accounts of any assignee, he shall be required to account for all interest, benefit, or advantage received, or in any manner agreed to be received, directly or indirectly, from the use, disposal or proceeds of the bankrupt's estate. And he shall be required, upon such settlement, to make and file in court an affidavit declaring, according to the truth, whether he has or has not, as the case may be, received, or is or is not, as the case may be, to receive, directly or indirectly, any interest, benefit, or advan-

tage from the use or deposit of such funds; and such assignee may be examined orally upon the same subject, and if he shall willfully swear falsely, either in such affidavit or examination, or to his report provided for in this section, he shall be deemed to be guilty of perjury, and on conviction thereof, be punished by imprisonment in the penitentiary not less than one and not more than five years.

The assignee's right to convey depends entirely upon the statute which gives him the power, and he is bound to convey in the manner prescribed by the statute, or else his conveyance is a nullity. *Stevens v. Palmer*, 10 Bosw. 60; *Harrington v. Fish*, 10 Mich. 445; *Gray v. Heslep*, 33 Mo. 238; *Warren v. Homestead*, 33 Me. 256; *Dwinel v. Perley*, 32 Me. 197; *Osborn v. Baxter*, 58 Mass. 406; *Joy v. Berdell*, 25 Ill. 537; *Holbrook v. Brenner*, 31 Ill. 501. Vide *Crowley v. Hyde*, 116 Mass. 589.

The register may designate the newspapers in which a notice of sale by the assignee shall be published. In *re Peter N. Burke*, 15 B. R. 40.

ACT OF 1867, § 5063. Whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent, or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

Statute revised — March 2, 1867, ch. 176, § 25, 14 Stat. 528.

This section intrusts the court with a discretion which can only be exercised by the court itself, and can not be delegated to any officer of the court. In *re Wm. Major*, 14 B. R. 71; in *re John Graves*, 1 B. R. 237; *a. c. 2 Ben.* 100.

An order of a register authorizing a private sale without notice is null and void. In *re Wm. Major*, 14 B. R. 71.

No confirmation by the court can give validity to an order of a register authorizing a private sale without notice. *Ibid.*

An approval by the court of a sale can not be regarded as a confirmation where it is private and does not become a part of the record until some time afterward. *Ibid.*

A purchaser at a judicial sale made under a void decree, is bound by the rule *caveat emptor* to look to the jurisdiction of the court, and the legality of the decree and proceedings from which it arose. *Ibid.*

A sale can only be made after such notice to those claiming adversely as the court in its discretion may deem proper. *Ibid.*

If property in dispute is sold without notice to the claimant, the sale is a nullity so far as he is concerned. *Stanley v. Sutherland*, 16 A. L. Reg. 298.

The sale must be public after public notice. *In re Wm. Major*, 14 B. R. 71.

Before the appointment of an assignee, the bankrupt is the custodian of the estate, and must act in the interest of the creditors. He stands in a fiduciary relation to the estate and can not be a purchaser. *March v. Heaton*, 2 B. R. 180; s. c. *Lowell*, 278.

*Quaere*, Does this clause apply to mortgaged property? Its language is better adapted to claims made by title paramount. *Foster v. Ames*, 2 B. R. 455; s. c. *Lowell*, 313.

The provision that the court may order a sale of property not in the possession of the assignee implies very clearly that the court may exercise such control as it deems proper, in regard to property which is in controversy, and which is not in the possession of the assignee. Of course it must be reduced to possession. Where a sale has been made and the proceeds realized by that sale are in controversy the court may order the proceeds to be delivered to the assignee, and held subject to the rights of the party who may prove himself entitled to it. *Bill v. Beckwith*, 2 B. R. 241; *Foster v. Ames*, 2 B. R. 455; s. c. *Lowell*, 313; *In re Josiah D. Hunt*, 2 B. R. 539; s. c. 1 C. L. N. 169.

Taken literally, the phrase "or which is claimed by him" appears to afford some support to the theory that the power of sale extends to any portion of an estate, the title to which is in dispute, where the same is claimed by the assignee; but it is impossible to adopt that view, as it would authorize the district judge, in the settlement of the estate of a bankrupt, however small, to order the sale of the estate, if claimed by the assignee, of every inhabitant of his judicial district, and to direct the assignee to hold the funds received from the sales in the place of the estate sold, and to compel the owners in possession of the same to appear in court and vindicate their titles, and to accept, if successful, the proceeds of the sales as the value of their property. Such a construction would annul the Constitution, for a man might under it be deprived of his property without due process of law, and could not claim a trial by jury unless he commenced his action before the court ordered a sale. The phrase can not, however, be rejected as surplusage. It was incorporated into the act for the purpose of giving an enlarged power of sale, and authorizes a sale though the estate may not have come to the possession of the assignee, if it is claimed by him, and the title is in dispute, as where personal estate is found in the hands of a mere depository, carrier, or bailee for safe-keeping or transportation, without claim of title or interest in the goods; or, what more frequently occurs, where personal property is subsequently



discovered in the possession of the bankrupt which was not transferred to the assignee, and other cases of a like character. Other examples might be put, but these are sufficient to show that the power of sale even as enlarged by incorporating the phrase into the provision, does not extend to a case where the estate in question is in the actual possession of a third person, holding the same as owner, and claiming absolute title to and dominion over the same, whether the title and possession were derived from the debtor, or any other former owner. *Knight v. Cheney*, 5 B. R. 305; s. c. 2 L. T. B. 205.

The notice required by this section to be given to a claimant is not in terms at least limited to claimants residing in the district. *Markson v. Heaney*, 4 B. R. 510; s. c. 1 Dillon, 497.

Under this provision the property may be recovered from the possession of the assignee by an action brought in a State court, before the commencement of proceedings in bankruptcy, and to which the assignee is made a party, or after the commencement of proceedings in bankruptcy, by an action brought in the bankruptcy court, or in the circuit court. But an action of replevin, brought in a State court, to recover specific property, after such property has been taken into custody by the bankruptcy court is not, within this section, a "proper action." *In re Vogel*, 2 B. R. 427; s. c. 3 B. R. 198; s. c. 7 Blatch. 18; s. c. 2 L. T. B. 154; *in re Noakes*, 1 B. R. 592.

If the assignee is satisfied that property taken by him did not belong to the bankrupt, he should return it without delay to the owner. *In re Noakes*, 1 B. R. 592.

The statute does not exempt an assignee from an action in a State court for a tortious taking of property not in possession of the bankrupt and belonging to a stranger. *Leighton v. Harwood*, 12 B. R. 360; s. c. 111 Mass. 67.

In an action against the marshal for an illegal seizure of property, the measure of damages is the true value of the property, not the amount for which it was sold. *Doll v. Harlow*, 11 B. R. 350; s. c. 5 N. Y. Supr. 609; s. c. 9 N. Y. Supr. (Hun) 659.

ACT OF 1867, § 5064. The assignee may sell and assign under the direction of the court, and in such manner as the court shall order, any outstanding claims or other property, in his hands, due or belonging to the estate, which can not be collected and received by him without unreasonable or inconvenient delay or expense.

Statute revised — March 2, 1867, ch. 176, § 28, 14 Stat. 530.

ACT OF 1867, § 5065. When it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order

the same to be sold, in such manner as may be deemed most expedient, under the direction of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of.

Statute revised — March 2, 1867, ch. 176, § 25, 14 Stat. 528.

The parties must apply to the court, and not to the register. *In re John Graves*, 1 B. R. 237; s. c. 2 Ben. 100.

The court can not order the sale of the property in an involuntary case until it comes into the hands of the marshal. *In re Metzler & Cowperthwaite*, 1 B. R. 38; s. c. 1 Ben. 356.

It is the duty of the court, from the moment that the property is submitted to its custody, to take due order for its preservation, and to turn it to the best account for the creditors. The district court may, therefore, even before the appointment of an assignee, order the sale of the whole or any part of the property, if it will be beneficial to the creditors, and is assented to by the bankrupt. *In re James Vila*, 5 Law Rep. 17.

The filing of a petition for a stay of the sale of certain property as perishable does not make the petitioner a party to the proceedings. *Marsh v. Armstrong*, 11 B. R. 125; s. c. 20 Minn. 81.

If a sale is made before the appointment of an assignee, it should not be made by the bankrupt. *In re James Vila*, 5 Law Rep. 17.

The bankrupt can not sell any of his property without authority from the court. *In re Richard Prior*, 4 Biss. 262.

If a sale is made before the appointment of an assignee, it is necessary that the creditors should have due notice of the application before the sale takes place, so that they may appear in the district court and show cause against any sale, or for a postponement thereof. The best mode of giving notice to the creditors is by advertisement in some public newspaper a sufficient time before the sale to enable them to act if they see fit. *In re James Vila*, 5 Law Rep. 17.

ACT OF 1867, § 5066. The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other incumbrance.

Statute revised — March 2, 1867, ch. 176, § 14, 14 Stat. 522. Prior Statutes — April 4, 1800, ch. 19, § 12, 2 Stat. 24; Aug. 19, 1841, ch. 9, § 11, 5 Stat. 447.

Quære. Can the assignee redeem before the debt is payable? *Foster v. Ames*, 2 B. R. 455; s. c. Lowell, 313.

ACT OF 1898, CH. 1, SEC. 1. \* \* \* **Debt.**—(11) "Debt" shall include any debt, demand, or claim provable in bankruptcy.

ACT OF 1867, § 5067. All debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. When the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate.

Statute revised — March 2, 1867, ch. 176, § 19, 14 Stat. 525. Prior Statutes — April 4, 1800, ch. 19, § 39, 2 Stat. 32; Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

**What Claims are Valid.**—When a creditor seeks to prove a debt against the estate of a bankrupt, he stands in the position of a plaintiff in a suit at law seeking to enforce such claim. In re Prescott, 9 B. R. 385; s. c. 5 Biss. 523; in re Robert Pittock, 8 B. R. 78; s. c. 2 Saw. 416.

The assignee may set up any defense to a claim which the debtor himself could set up. In re Prescott, 9 B. R. 385; s. c. 5 Biss. 523.

Any debt which may be proved by complying with the provisions of the bankruptcy act is a provable debt. It is true that a secured creditor can be admitted as a creditor only for the balance of his debt after deducting the value of the property upon which he has a lien, unless he releases or conveys his security to the assignee, in which case he may be admitted as a creditor for his whole debt; yet his debt is, nevertheless, provable within the meaning of the act, before such balance is ascertained or such release or conveyance is made. It does not follow that, because he can not be admitted as a creditor, he, therefore, can not prove his debt. On the contrary, the proving of his debt is a necessary preliminary step to his eventually being admitted as a creditor. In re Bloss, 4 B. R. 147; s. c. 2 L. T. B. 126; Rankin & Pullan v. Florida, Atlantic & G. C. R. R. Co., 1 B. R. 647; s. c. 1 L. T. B. 85. Contra, Sigsby v. Willis, 3 B. R. 207; s. c. 3 Ben. 371; s. c. 1 L. T. B. 71.

The time of the adjudication of bankruptcy is the time of filing the petition. In re Patterson, 1 B. R. 125; s. c. 1 Ben. 508. Contra, in re Hennocksburch & Block, 7 B. R. 37; s. c. 6 Ben. 150.

The time of the adjudication in bankruptcy is taken by the statute as the decisive time. The debt must exist at the time, or it can not be

proved. If it exists then, but is not payable until afterward, and is not a debt running with interest, there must be a rebate from its amount of the interest on that amount from the time of the adjudication of bankruptcy to the time when it would be payable. If it exists, but is payable before that time, and bears interest, the statute intends that the debt shall be proved for the amount of the principal, and of the interest thereon to the time of the adjudication of bankruptcy. *In re Orne*, 1 B. R. 57; s. c. 1 Ben. 361; *in re Crawford*, 3 B. R. 608; s. c. 3 L. T. B. 169; s. c. 5 B. R. 301; *in re Port Huron Dry Dock Co.*, 14 B. R. 253.

The accrued interest constitutes part of a debt provable against the bankrupt's estate. *Sloan v. Lewis*, 12 B. R. 173; s. c. 22 Wall. 150; s. c. 68 N. C. 557; *in re Hugo Broich*, 15 B. R. 11.

If the contract is silent as to interest after maturity, the creditor is entitled to interest after that time by operation of law, and not by any provision of the contract. Interest can not be allowed on interest in such cases. *In re Geo. A. Bartenbach*, 11 B. R. 61; s. c. 2 A. L. T. (N. S.) 33.

No interest can be allowed on the bills of a bankrupt bank until payment has been demanded thereon and refused. *In re Bank of North Carolina*, 10 B. R. 289.

The proof of a bank bill against a bankrupt bank is equivalent to a demand of payment, and if the estate is sufficient to pay the face value of the claims as proved, interest may be allowed from the time of filing the proof. *Ibid.*

Claims will draw interest from the time of the adjudication up to the payment at the agreed rate, when that is agreed upon, and when not at the legal rate. *In re Strachan*, 3 Biss. 181.

Interest on provable debts can not be computed as against the general assets beyond the date of the adjudication. The estate is a dead fund, and in such a shipwreck, if there is a salvage of a part to each person in the general loss, it is as much as can be expected. It is immaterial to the creditor at what time interest stops on his debt, provided interest on all the debts stops simultaneously with his own, for his proportionate share of the assets will be the same, whatever period be fixed for the stoppage on all the debts. *In re Haake*, 7 B. R. 61; s. c. 2 Saw. 231; *in re Oliver Bugbee*, 9 B. R. 258.

If the value of a security held by a creditor is greater than the amount of the debt, interest may be computed up to the day of payment and allowed thereon. *In re Haake*, 7 B. R. 61; s. c. 2 Saw. 231; *in re Frank Newland*, 9 B. R. 62; s. c. 7 Ben. 63.

Interest on a lien claim should be allowed up to the date of making up the report. *In re Abraham A. Devore*, 24 Pitts. L. J. 185.

The rate of interest and damages which the drawer of a bill of exchange is to pay *ex mora*, is governed by the law of the place where the bill is drawn. *In re Chas. H. Glyn*, 15 B. R. 495; s. c. 9 C. L. N. 183.

If judgment is recovered before the commencement of proceedings in bankruptcy, the costs are a part of the debt, and may be proved. Interest on the judgment is also provable. *Ex parte O'Neil*, 1 B. R. 677; s. c. Lowell, 162.

A trustee may prove his claim for services rendered under an assignment. *In re George Lains*, 24 Pitts. L. J. 207.

A judgment for costs is a provable debt. *Graham v. Pierson*, 6 Hill, 247.

A judgment for costs incurred after bankruptcy is not a provable debt. *Sanford v. Sanford*, 12 B. R. 565; s. c. 58 N. Y. 67.

If a draft falls due after the commencement of proceedings in bankruptcy, or is payable at the domicile of the debtor, damages for the non-payment thereof can not be allowed. *In re Oliver Bugbee*, 9 B. R. 258.

Drafts drawn and accepted after the commencement of proceedings in bankruptcy are not provable, although the acceptor paid the money to extinguish claims that existed prior to that time. He is not entitled to be subrogated to the rights of the creditors to whom the drafts were given, unless he has taken an assignment of their claims. *In re Strachan*, 3 Biss. 181.

A claim against the bankrupt for liability on stock held by him, can not be proved until an assessment is made by competent authority. *Gibson v. Lewis*, 11 B. R. 247; s. c. 9 Pac. L. R. 75; s. c. 32 Leg. Int. 22.

The liability of a stockholder for the debt of a corporation is not a provable debt. *James v. Atlantic Delaine Co.*, 11 B. R. 390.

**Contracts.**—The only legal effect of an indorsement of a Confederate bond was to transfer the title, and not to render the party liable as indorser or guarantor. *Holleman v. Dewey*, 7 B. R. 269.

If a policy of insurance contains a clause authorizing the assured to surrender the policy at any time, or the company to cancel the same on five days' notice, and provides for a return of a part of the premium in either event, the holder may cancel and surrender the policy after the company becomes insolvent, and before it becomes bankrupt, and the return premium will be a provable debt. *In re Independent Ins. Co.*, 7 A. L. Rev. 362.

The right to maintain an action for money had and received, does not always depend on privity of contract, or upon contract at all. It is enough to prove that the defendant has money of the plaintiff which in equity and good conscience, he ought not to retain. Where the defendant is bound by a valid contract to pay the money to some one else, the plaintiff can not prevail. The law does not imply a contract to pay A. when the debtor is already bound by a valid contract to pay B. In cases not founded on a direct contract, the inquiry is not concerning priority of contract, but concerning identity of property. If a party fraudulently overdraws his bank account, the bank has a claim upon those who received the checks without giving value therefor. Their obligation to pay the drawer must yield as soon as the fraud is shown. The bank has a claim for the bank bills which were drawn out upon the fraudulent checks by the parties themselves. The same result will follow whenever the proceeds of fraudulent checks are traced to their possession, whether in the identical bills or not. When such checks are paid directly to the parties, it will be presumed that they drew them, or caused them to be drawn. In those instances in which such checks are paid directly to the creditors of such parties, it may be

somewhat more difficult to say that the money of the bank comes to the hands of the parties themselves. *In re Eureka Manuf. Co.*, Lowell, 500.

The debt of a wife contracted *dum sola* is a provable debt. *Vanderheyden v. Mallory*, 1 N. Y. 452.

A note given to compensate another for indorsing a note for the maker is valid. *Providence Co. Savings Bank v. Frost*, 13 B. R. 356.

A subscription for a religious or charitable institution given in consideration of a similar subscription by another party, and not revoked until the institution has incurred new expenses on the faith of it, is a valid promise, and founded on good and sufficient consideration. *Capelle v. Trinity Church*, 11 B. R. 536.

If the bankrupt agrees to pay expenses of taking out a patent in consideration of an interest therein, an indorsement of a note given to pay for labor on the patent is for a valuable consideration, and the note is a provable debt. *In re Cosmore G. Bruce*, 6 Ben. 515.

If notes are given to an accommodation indorser to indemnify him for his liability, and are subsequently indorsed by him, and passed to a third party, with the fraudulent design of charging the estate of the maker with a larger amount than is justly chargeable, the holder can not prove the claim against the indorser, even for the amount paid for the notes. *In re Leonard L. Hook*, 11 B. R. 283.

A person can not claim to be a bona fide holder of a note, if the circumstances are of such a strong and pointed character as necessarily to cast a shade on the transaction, and to put him on the inquiry. *Ibid.*

An overdue note under seal, given as a collateral security to indemnify the payee against liabilities as indorser for the bankrupt, is a provable debt, although the payee has not actually advanced the money for which he is bound as surety. *Roosevelt v. Mark*, 6 Johns. Ch. 266.

A promissory note to deliver specific articles is a provable debt. *Chandler v. Windship*, 6 Mass. 310; *McMullen v. Bank*, 2 Penn. 343.

If a creditor signs a negotiable paper after the commencement of the proceedings in bankruptcy, the purchaser takes it subject to all just offsets existing at the time of the commencement of the proceedings, for the creditor can assign, and the assignee can purchase, no more than the balance due from the bankrupt after all credits are admitted. *Humphreys v. Blight*, 1 Wash. 44; s. c. 4 Dall. 370.

If one of several joint makers of a promissory note takes it up by giving his individual note therefor, and thus satisfies the holder, it is immaterial how he satisfies him, and he has a demand for contribution, whether he has, in point of fact, paid his own note or not. *Fox v. Eckstein*, 4 B. R. 373.

Debts created by fraud, and debts created by defalcation in a fiduciary character are provable. *In re Rundle & Jones*, 2 B. R. 113.

A person who has advanced money to the bankrupt for the purchase of stock, which, however, was purchased in the name of the bankrupt, and by him hypothecated for money loaned to him, has, as against the other creditors, merely a provable debt to the amount of the value of the stock so directed to be purchased for him. *Ungewitter v. Von Sachs*, 3 B. R. 723; s. c. 4 Ben. 167; s. c. 1 L. T. B. 224; s. c. 3 L. T. B. 195.

A claim for services rendered by counsel for the bankrupt in opposing the petition in involuntary proceedings, is a provable debt. *In re N. Y. Mail Steamship Co.*, 2 B. R. 74, 554; s. c. 3 B. R. 280, 627; s. c. 7 Blatch. 178.

A claim for services rendered by counsel for the bankrupt in the preparation of papers in voluntary bankruptcy is provable. *In re Thos. C. Evans*, 3 B. R. 261.

A person who has taken charge of the bankrupt's property under a deed of trust, which was subsequently declared void under the provisions of the bankruptcy act, has a claim against the bankrupt for services so rendered, and such claim is a provable debt, although he had notice that the deed was fraudulent at the time when he rendered the services. *Catlin v. Foster*, 3 B. R. 540; s. c. 1 Saw. 37; s. c. 1 L. T. B. 192.

A party dealing with an agent has a right to resort to his principal to compel the performance of an ordinary or verbal contract made by the agent for the benefit, and by the authority, of his principal, unless the credit was knowingly given exclusively to the agent. This principle also applies, although the agent contracts in his own name without disclosing his principal, and the other party supposes the agent to be acting for himself only, and it makes no difference that the contract is in such form that the agent is also personally liable. *In re Troy Woolen Co.*, 8 B. R. 412.

Some law under which a corporation with the powers assumed may be lawfully created must be shown in addition to mere user before an association can be said to exist *de facto*. An association must be shown to be a corporation *de facto* within this rule before a party dealing with it will be deemed to be estopped from showing that it had no legal corporate existence. In such case a creditor may treat the association as a partnership, and his claim will constitute a debt provable against the members. *In re Richard J. Mendenhall*, 9 B. R. 497.

If a note on its face purports to make the promise that of the bankrupt corporation, and bears the impression of the seal of the corporation, it is provable against the estate, although the signature is merely that of the president as president. *In re Kansas City Manuf. Co.*, 9 B. R. 76.

When the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, the presumption is that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority. *Ibid*.

Parol evidence is admissible to prove that a note executed by an officer of a corporation was intended as the promise of the corporation. *In re Southern Minn. R. R. Co.*, 10 B. R. 86.

A party who elects to prove his claims as for goods sold and delivered to the bankrupt, can not without withdrawing the proof institute an action of replevin on the ground that the bankrupt was merely his agent. *Ormsby v. Dearborn*, 116 Mass. 386.

**Partnership.**—Where a member of a firm files a separate petition, a partnership creditor may prove his claim. *In re Frear*, 1 B. R. 660; s. c. 35 How. Pr. 249; s. c. 2 Ben. 467.

Where one partner, in fraud of the firm, issues firm notes for the purpose of obtaining his share of the capital, an accommodation indorser who subsequently pays them has no claim against the firm, if by prudent inquiry at the time of their indorsement he could have ascertained that they were unconnected with the current business of the firm. *In re Dunkle & Driesbach*, 7 B. R. 107.

If a note is drawn by one partner in the firm name, apparently in the course of the firm dealing, the title of the holder will not be affected by his mere knowledge of facts that were admonitory to greater caution and further inquiry. There must be knowledge of facts impeaching the validity of the note. The fault of the partner's meditated fraud must be implanted in the holder's title, so that his assertion of a claim against the firm would necessarily subject him to the imputation of bad faith. *Bush v. Crawford*, 7 B. R. 299; s. c. 2 L. T. B. 239.

An agreement made by a member of a firm who are the payees of an accommodation note not to call on the maker for payment, binds the other partner who was personally ignorant of the transaction, and he can not prove the note against the maker, although he took it up with his own individual funds. *Capelle v. Hall*, 12 B. R. 1.

In favor of third persons acting in good faith, the presumption is that notes indorsed in the name of the firm were indorsed on partnership account, and the indorsement will bind the firm, unless it appears that the holder had notice that the indorsement was outside of partnership affairs. *Lemoins v. Bank*, 3 Dillon, 44.

If the holder has notice that the indorsement is an accommodation indorsement, the burden of proof is upon him to show the assent of the partners, either express or implied, from the firm's course of dealing. *Ibid.*

The possession of a note by the maker before its maturity raises a presumption that an indorsement thereon is an accommodation indorsement. *Ibid.*

A check drawn in the firm name for the proceeds of a note bearing the accommodation indorsement of the firm, does not operate as a ratification, so as to bind a partner who had no knowledge of the indorsement or of the drawing of the check. *Ibid.*

If a party advances money to one partner for a purpose entirely outside of the partnership business, and takes a firm note therefor, the burden is on him to prove the consent of the other partner; and if he fails to do so, the claim is not provable against the joint estate. *In re Forsyth & Murtha*, 7 B. R. 174.

An indebtedness growing out of partnership transactions, of which no settlement has been made between the parties, in a case where the partnership debts have not all been paid nor all the partnership property disposed of, and being in part for assets that have never been disposed of, is not a provable debt. But a claim arising from a fraudulent misappropriation of the partnership funds by one partner may be proved against the separate estate of the wrong-doer. The partner thus wronged by such dishonest and fraudulent acts of his copartner, is entitled to treat the mis-



appropriation as entirely foreign to the partnership business, and prove the debt for his share of such funds precisely the same as though the partnership had never existed. *Sigsby v. Willis*, 3 B. R. 207; s. c. 3 Ben. 371; s. c. 1 L. T. B. 71.

When the articles of partnership stipulated that the share contributed by each partner to the capital stock should be left in the concern until the expiration of the partnership, and the partnership gave a firm note, payable four days after date, to each member, for the share contributed by him, the wife of a partner who has indorsed his note to her before maturity, for money loaned by her to him, and by him contributed to the capital stock of the firm, can not prove the note against the firm until the partnership debts are paid. She may prove it against her husband, and is entitled to participate in any dividend of the proceeds of his individual estate. The knowledge of the husband of facts affecting the wife's property, which he is managing by her consent, must be regarded as the knowledge of the wife, and she must be charged with notice of all facts known to him which may affect his transactions on her behalf. *In re Frost et al.*, 3 B. R. 738.

In order to dissolve a limited partnership under the laws of New York there must be one publication of the dissolution, and then a repetition three times after the first publication, at an interval of seven days between each of the four times. *In re King et al.*, 7 B. R. 279.

The general partners in a limited partnership can not bind the firm by a contract beyond the purpose and scope of the partnership, and a claim arising from such a contract can not be allowed as an offset to a debt due to the firm. *Taylor v. Rasch*, 11 B. R. 91.

No departure by the general partners from the scope of the business, no matter how common or long continued, if not consented to or known and acquiesced in by the special partner, can have the effect to change or enlarge the scope of the business. *Ibid.*

Until a partner pays the partnership debt, he has no claim, contingent or otherwise, against his copartner. *Hester v. Baldwin*, 2 Woods, 433.

If one partner advances more than his proportion to the capital of the firm, the assignee of the firm may prove for such advance against the estate of the copartner. *In re John McLean & Son*, 15 B. R. 333.

**Equitable Debts.**—Equitable debts are within the scope of the bankruptcy act. It is the intent of the statute to give all creditors an equal share of the assets, without regard to the mode in which their rights might have been enforced if there had been no bankruptcy, and that the debtor should be discharged from all debts and demands which are liquidated or capable of liquidation. In respect to both debtors and creditors, the act is highly remedial, and the district court is vested with most ample equitable powers to enable it to work out full remedies to all persons. This section makes provable all debts and liabilities, in language broad enough to cover such as a trustee owes to his cestui que trust, or a partner to his copartner, and so of demands which but for bankruptcy would be properly cognizable in a court of admiralty. If this were not so, the law could not be uniform, for proof of debts would

depend on the remedies given in the several States, in one of which the very same debt might be sued at law, which in another must be prosecuted in equity, and in some of which there is no distinction between law and equity. In *re Blandin*, 5 B. R. 39; s. c. *Lowell*, 543; s. c. 2 L. T. B. 198; *Roosevelt v. Mark*, 6 Johns. Ch. 266.

When the bankrupt has carried on business in the name of another, demands arising from such business may be considered as equitable debts of the bankrupt, and proved against his estate. In *re Wm. H. Long*, 3 B. R. (quarto) 66.

**Claims by Bankrupt's Wife.**—Money loaned by the wife of the bankrupt to him out of her separate estate is a claim that may be proved. While the law regards claims of this character with great distrust, equity will protect the rights of the wife even against the creditors of the husband. The court being satisfied that the money was the separate property of the wife, and was placed in the husband's hands as a loan or trust for the benefit and use of the wife, and not as a gift, will adjudge him to be her debtor to that amount, and will award payment to her as to any other creditor. In *re Bigelow et al.*, 2 B. R. 556; s. c. 3 Ben. 198; in *re Blandin*, 5 B. R. 39; s. c. *Lowell*, 543; s. c. 2 L. T. B. 198; in *re David W. Jones*, 9 B. R. 56; s. c. 6 Biss. 68.

Gifts from the husband to the wife can not be offset against such a loan. If the gifts were disproportioned to the circumstances of the parties, or there were reasons to suspect the motives with which they were made, the court might marshal the gifts and offset them against the loan. In *re Bigelow et al.*, 2 B. R. 556; s. c. 3 Ben. 198.

A mortgage taken in the name of the wife merely for the sake of convenience will not be deemed a settlement or advancement, and a subsequent use of the notes by the husband will not give the wife a valid claim against his estate. In *re David W. Jones*, 9 B. R. 56; s. c. 6 Biss. 68.

Where the husband, by the consent of his wife, is in the habit of receiving the income, profits, and dividends of her separate estate, the law presumes that she intended to thus dispose of them for the benefit of the family, and does not, therefore, imply a promise to repay them. *Ibid.*

A note given by the bankrupt to his wife for a legacy previously reduced to possession, is without consideration and can not be enforced. *Canby v. McLearn*, 13 B. R. 22.

**Defenses.**—Where a foreign creditor has obtained a judgment and levied an execution upon the personal property of the bankrupt in such foreign country after the commencement of proceedings in bankruptcy, if he seeks to prove his claim he must first refund what he has so acquired, and come in equally with the rest of the creditors, or not at all. In *re Oliver Bugbee*, 9 B. R. 258.

If the debt of such foreign creditor consists of two claims, on one of which alone was such judgment obtained and execution issued, he can not prove either claim, for the whole debt of the creditor is considered the debt upon which the principle of equality operates. *Ibid.*

If a foreign corporation transacts business within the limits of a State before the appointment of an agent upon whom process may be served, where such appointment is required by the laws of the State as a condition precedent to the right to transact such business, all contracts so made are void. In re Comstock & Co., 12 B. R. 110; s. c. 3 Saw. 320.

A debt contracted by a feme covert in a case where she was not authorized to incur it by the law of her domicile, is not provable. In re Schlichter, 2 B. R. 336; in re Rachel Goodman, 8 B. R. 380; s. c. 5 Biss. 401.

The taking of the note of a third party for a debt, and the obtaining of a judgment thereon, extinguish the original debt, and make it the debt of the third party. In re Hinds et al., 3 B. R. 351.

A receipt given by the bankrupt to the sheriff for certain property taken under an attachment is a provable demand. Fowles v. Treadwell, 24 Me. 377.

A surety fixed at law, and having as a security an absolute note for a sum certain, due and payable, or a judgment in the name of his trustee, but for his use, for a sum certain, due and payable, may be admitted to prove his debt, although the notes upon which he is fixed as indorser, or the forfeited bonds on which he stands as security have not been actually paid. He has his legal, absolute debt, liable only to be defeated in equity by the very remote and possible contingency that he may never be called upon to pay the notes and bonds. Roosevelt v. Mark, 6 Johns. Ch. 266.

An absolute judgment in the name of another to indemnify a surety for liabilities incurred by him for the bankrupt, is a legal subsisting debt of which the surety is the beneficial owner, and which he may prove. Ibid.

A gift made voluntarily and freely by the donor, and accepted by the donee, is not a sufficient consideration to support the promise contained in a note which was not executed on consideration, nor as a condition of the gift. At most it is only a moral consideration, and is not sufficient to support a promise. There is no legal obligation or duty which a promise can reach and rest on. A note, which is a mere renewal or repetition of a lost voluntary note, is like that without consideration and void. In re Cornwall, 4 B. R. 400; s. c. 6 B. R. 305; s. c. 9 Blatch. 114; s. c. 2 L. T. B. 220.

In order to entitle a third party to prove a note which was given without any valuable consideration, there must be some present consideration at the time of the transfer. He must show that he paid value when he took it, or incurred some responsibility, or relinquished some right, or granted some indulgence, or discharged a precedent debt, upon the faith and credit of the paper. In re Howard, Cole & Co., 6 B. R. 372; s. c. 2 Md. L. R. 448.

If a party has broken the essential part of a contract, his claim thereon will be disallowed, for he must fulfill the essential part of his contract, or show that he has been released therefrom by the bankrupt, or prove that the bankrupt, and not himself, was the cause of his failure to comply therewith. If he fails to do this, he is without legal remedy or equitable redress. In re Nounnan & Co., 7 B. R. 15.

A debt incurred by the loan of Confederate notes is not provable. In re Milner, 1 B. R. (quarto) 19; s. c. 1 B. R. 419; s. c. 35 Ga. 330; s. c. 1 Abb. C. C. 261; s. c. 1 L. T. B. 15.

The acceptance of Confederate notes or bonds as payment was a sufficient consideration to liquidate or discharge a contract debt. Holleman v. Dewey, 7 B. R. 269.

A claim for money loaned to a debtor to enable him to depart from the State with intent to defraud his creditors is not provable. In re Hatje, 12 B. R. 548; s. c. 6 Biss. 436.

A savings bank which is prohibited from making a loan on personal security, can not prove a note taken for such loan. In re Jaycox & Green, 13 B. R. 122; s. c. 12 Blatch. 209; s. c. 7 B. R. 578; s. c. 13 Blatch. 70.

A savings bank which is prohibited from making loans on personal security can not prove claim for money so loaned. In re Jaycox & Green, 13 B. R. 122; s. c. 12 Blatch. 209.

A contract for the services of convicts is valid, although the contractor did not make the deposit with the comptroller required by law. In re Edward Burt et al., 13 B. R. 137; s. c. 12 Blatch. 252.

A note given for negroes before the emancipation proclamation took effect is valid and constitutes a provable debt. Miller v. Keyes, 3 B. R. 224. Contra, Buckner v. Street, 7 B. R. 255.

If a compromise failed because all the creditors refused to sign it, a creditor who received a secret preference may prove his original debt, although the assignee by suit compelled the refunding of the fraudulent preference. Brookmire v. Bean, 12 B. R. 217; s. c. 3 Dillon, 136.

The purchase of the right to deliver grain at a certain price before some future day, is void as a wagering contract. If the parties do not intend to deliver the grain, but only at the utmost to settle the differences, and the holder can only prove for the purchase money where the State laws on the subject of gaming allow the money paid to be recovered. In re P. K. Chandler, 9 B. R. 514; s. c. 6 Biss. 53; in re John Green, 15 B. R. 198.

A broker who advances the margin for his principal on a gaming contract, for a future delivery of grain, can not prove for such advance under the laws of Wisconsin. In re John Green, 15 B. R. 198.

A factor may prove a note against his principal given for money advanced by him on a contract for a future delivery of cotton, where there was to be no delivery but the difference only was to be paid, and for services in relation to that contract. Lehman v. Strassberger, 2 Woods, 554.

If a party reserves the option to receive or deliver cotton on a contract for a future delivery, the contract is not a wagering contract if he did not communicate his purpose not to receive or deliver to the other party. Ibid.

If the goods were selected by the bankrupt and at his request set apart and marked with his name, this is a sufficient delivery and acceptance, and the vendor may prove the claim although the goods were destroyed by fire in his store. In re Downing, 15 B. R. 564; s. c. 13 Pac. L. R. 167.

When a contract is within the statute of frauds it is not completed until there is an actual acceptance and receipt of the goods. In such cases the contract is to be governed by the law of the place where the goods are accepted, and when it is illegal there, on account of a law prohibiting the sale of liquor, it is not provable. In Michigan payments can not be applied to the older items in point of time, so as to extinguish the items for spirituous liquors. A note given for the balance of an account of which items for liquor constitute a part, being founded in part on an illegal consideration, is totally void. In *re Paddock*, 6 B. R. 132; s. c. 2 L. T. B. 214; in *re Town et al.*, 8 B. R. 38.

A verbal contract is not within the statute of frauds, unless it expressly shows that it was not to be performed within a year from the making thereof. *Capelle v. Trinity Church*, 11 B. R. 536.

If a note is made in the State and sent by mail to another State where the sale was made, the validity of the note must be determined according to the laws of the latter State. In *re Town et al.*, 8 B. R. 38.

A claim for goods sold to the bankrupt under a contract made in another State, by a citizen of that State, and valid in the place where it was made, is a provable debt, even though no suit could be maintained thereon in the courts of the State where the bankrupt resides and files his petition. If an action can be sustained on the claim before the circuit court, on appeal, and if the discharge would relieve the debtor from his liability therefor, then the district court should recognize and allow the same as a debt provable against the bankrupt's estate. The proceedings in bankruptcy being by virtue and authority of the act of Congress, which authorizes the proof of all legal demands against the bankrupt's estate, a law of the State denying all remedy for the recovery of the account, can not in any way control the proceedings in bankruptcy of the district court. In *re Murray*, 3 B. R. 765.

A valid debt is provable, even though prosecuted by an attorney who has taken it for collection under an agreement to pay all expenses and retain a certain per cent. of all that may be recovered as a compensation for his services. The claim against the bankrupt exists independently of such an agreement. The agreement is a collateral matter. Under such circumstances it has never been held that an agreement made by a creditor with a third party in reference to the prosecution of a claim, although it would be held to be champertous if either party to it were setting it up as the foundation of a suit, or a defense in a court of justice, can be used to defeat the creditor in establishing a claim otherwise valid. In *re Lathrop et al.*, 3 B. R. 413; s. c. 3 Ben. 490.

A debt is provable, although it may be barred by the statute of limitations of the State where the petitioner resides. In *re Ray*, 1 B. R. 203; s. c. 2 Ben. 53; in *re L. Sheppard*, 1 B. R. 439; s. c. 1 L. T. B. 49; s. c. 7 A. L. Reg. 484. Contra, in *re Danl. P. Kingsley*, 1 B. R. 329; s. c. Lowell, 216; in *re Harden*, 1 B. R. 395; s. c. 1 L. T. B. 48; in *re Cornwall*, 6 B. R. 305; s. c. 4 B. R. 400; s. c. 9 Blatch. 114; s. c. 2 L. T. B. 220; in *re C. W. Reed*, 11 B. R. 94; s. c. 6 Bliss. 250.

Where a debt is already barred by the statute of limitations, a promise by the debtor to pay it when he is able is regarded as conditional, and not to create an obligation as a revival of the debt until ability to pay appears; but where there is a present debt, a promise to pay when able does not destroy the right of the creditor to sue, nor postpone such rights, and in no wise hinders or prevents the running of the statute. In *re Cornwall*, 6 B. R. 305; s. c. 4 B. R. 400; s. c. 9 Blatch, 114; s. c. 2 L. T. B. 220.

The filing of the petition in bankruptcy creates a trust, and the statute of limitations which ran against the debt ceases to run against the trust, and the debt is not barred if the time of limitation had not expired at the commencement of the proceedings in bankruptcy. In *re Eldridge & Co.*, 12 B. R. 540. Vide in *re Robert Morris*, Crabbe, 70; in *re John S. Wright*, 6 Bliss. 317; in *re J. W. Maybin*, 15 B. R. 468.

The statute of limitations does not run against one who was a non-resident at the time of the accruing of the cause of action until he comes into the State. *Capelle v. Trinity Church*, 11 B. R. 536.

**Usury.**—The assignee may set up the defense of usury against any claim presented for proof. The principles adopted in a court of equity where a debtor seeks relief from a usurious contract do not apply, for the creditor is seeking to enforce his contract. In *re Prescott*, 9 B. R. 385; s. c. 5 Bliss. 523.

The district court has jurisdiction to pass upon the legality of a claim, and to reject it if it is void under the usury laws, although it may not have jurisdiction to enforce a penalty imposed by a State law on account of an act making any such claim illegal. In *re Robert Pittock*, 8 B. R. 78; s. c. 2 Saw. 416.

The defense of usury may be pleaded so long as any part of the debt for which the usury was paid or agreed to be paid remains unpaid. In *re Prescott*, 9 B. R. 385; s. c. 5 Bliss. 523.

Where a creditor seeks to prove his claim, a forfeiture of all interest for usury may be enforced. *Ibid.*

If a loan is made at the rate of thirty per cent., and eighteen per cent. of such interest is put in a separate note, which is not due at the time of the filing of the petition, the rebate must be at the rate of eighteen per cent. In *re Riggs, Lechtenberg & Co.*, 8 B. R. 90.

Notes drawn, dated, signed, and indorsed in one State, where the makers and indorsers reside, but sent to another State to be discounted, are to be governed by the laws of the latter State if they are accommodation paper, for they are not complete contracts until they are transferred for a valuable consideration. The fact that the consideration was remitted by check to the former State does not affect the question. If the notes are void for usury by the laws of the latter State, they are not provable. In *re Conrad*, 4 L. T. B. 189; s. c. 28 Leg. Int. 324; *Providence Co. Savings Bank v. Frost*, 13 B. R. 356.

The principal of money loaned by a national bank upon usurious interest is a provable debt. *Moore v. National Exchange Bank of Columbus*, 1 B. R. 470; s. c. 2 Bond. 170; s. c. 1 L. T. B. 74.

If the usury laws of the State do not apply to loans made to corporations, then as to such loans there is no law of the State, and the whole interest is forfeited for usury under the laws of the United States. In *re Wild*, 10 B. R. 568; s. c. 8 A. L. J. 235.

A mere accommodation indorser is entitled to all the protection which his principal may obtain, and can set up the defense of usury. *Ibid*.

**The Amount that May be Proved.**—When a party holds, as collaterals, notes of the bankrupt which are invalid as between the bankrupt and the payee, and is a bona fide holder, he may prove the full amount of the notes, or as much thereof as may be necessary to entitle him to a dividend equal to the full sum of his claim. *Bailey v. Nichols*, 2 B. R. 478; s. c. 2 L. T. B. 60; s. c. 1 C. L. N. 185; in *re Storms & Co.*, *Lowell*, 394.

There is no law for restricting the proof on a note to the amount paid for it. The right of a party who holds a note of the bankrupt as a collateral can not be enlarged after bankruptcy, nor will a good title as pledgee be merged in a defective title as purchaser. The rule of equity is that the party may hold by his best title. If the pledgee releases the pledgor, and retains the note at a certain per cent., he will be considered a pledgee who has in good faith recovered what he could from the pledgor, and may prove for the full amount of the note, but can receive dividends only to the extent of the per cent. at which he took it. In *re Storms & Co.*, *Lowell*, 394.

A party who has compromised his claim with the bankrupt after the commencement of proceedings in bankruptcy, can not, in the absence of fraud on the part of the bankrupt, hold his claim against the estate of the bankrupt for the balance beyond the amount so received on the compromise. As to fraud, if the contract for compromise is void for fraud, it must be void in the whole and not in the part. The creditor can not retain the amount received under the compromise and prove a claim for the balance. He can not affirm one-half of the contract and disaffirm the other. In *re Lathrop et al.*, 3 B. R. 413; s. c. 3 Ben. 490.

If the bankrupt as a commission merchant sells grain in violation of the order of his principal, no reference in estimating the damages can be had to the market at any later time than the date of the bankruptcy. *Lehmer v. Smith*, 1 C. L. B. 45.

Payments made by the maker of a promissory note after the proof thereof against the indorser do not affect the amount upon which a dividend can be demanded unless the result would be to overpay the note. In *re George S. Weeks*, 13 B. R. 263.

Where payments have been made by the maker of a promissory note prior to the proof against the indorser, the balance is the only amount that can be proved against the estate of the latter. *Ibid*.

**Effects of Acts Done After Bankruptcy.**—A note made prior to the commencement of proceedings in bankruptcy, which was taken up after such proceedings were commenced by the bankrupt's giving a new note, does not constitute a debt which may be proved by an indorser. If a creditor of the bankrupt, after the adjudication, accepts a new obligation from the bankrupt in substitution for the debt existing at the time

of the filing of the petition, he relinquishes his claim upon the estate of the bankrupt, and must look to his debtor alone for the payment of his debt. *In re Henry B. Montgomery*, 3 B. R. 429.

A debt upon which a judgment has been rendered since the commencement of proceedings in bankruptcy, may be proved. The debt is not extinguished. The instrument, contract, or obligation upon which the debt arose is extinguished, but not the debt. The debt remains. If this were not so, the judgment would destroy itself by extinguishing the very foundation upon which it is built. The debt was founded upon contract; it is now founded on judgment, but it is, nevertheless, the same debt. A judgment operates to extinguish a debt only when it produces the fruits of a judgment. It operates as a change of remedy merely. It is a security of a higher nature. It is still but a security for the original cause of action. The theory that the debt is so merged in the judgment as to be extinguished, has no applicability under the bankruptcy act. *In re Crawford*, 3 B. R. 698; s. c. 1 L. T. B. 211; s. c. 3 L. T. B. 169; s. c. 5 B. R. 301; *in re Vickery*, 3 B. R. 696; *in re S. Brown*, 3 B. R. 584; s. c. 5 Ben. 1; *Barnes v. U. S.*, 12 B. R. 526; s. c. 21 L. R. R. 212.

Contra, neither the debt nor the judgment is provable. The debt is merged in the judgment, and the judgment did not exist at the time of the adjudication of bankruptcy. *In re David B. Williams*, 2 B. R. 229; s. c. 1 L. T. B. 107, 113; s. c. 3 A. L. Reg. 374; *Bradford v. Rice*, 102 Mass. 472; *in re Gallison et al.*, 5 B. R. 363; s. c. 2 L. T. B. 195; *in re A. S. Mansfield*, 6 B. R. 388.

It is not the judgment but the debt, as it existed on the day of the filing of the petition, that is provable. *In re Vickery*, 3 B. R. 696; *in re S. Brown*, 3 B. R. 584; s. c. 5 Ben. 1; *in re Louis H. Rosey*, 8 B. R. 500; s. c. 6 Ben. 507; *in re Theodore Vetterlein*, 13 Blatch. 44; *in re J. W. Maybin*, 15 B. R. 468.

Contra, the debt or claim as it stood at the time of the filing of the petition, is merged in the judgment, and, therefore, the judgment must be proved. The judgment must be proved, not because it existed at a proper time, but because the debt constituting the foundation did exist at that time. The costs, however, which accrued subsequent to the time of the filing of the petition, can not be said to constitute a claim or debt which existed at that time, and should be excluded in making up the amount upon which dividends are to be declared. *In re Crawford*, 3 B. R. 698; s. c. 1 L. T. B. 211; s. c. 3 L. T. B. 169; s. c. 5 B. R. 301; *Monroe v. Upton*, 50 N. Y. 593; s. c. 6 Lans. 255.

It is not necessary for a creditor who recovered judgment after the adjudication of bankruptcy to strike out his judgment before he can prove the claim on which the judgment was recovered. *In re Ezra M. Stevens*, 4 B. R. 367; s. c. 4 Ben. 513; s. c. 2 L. T. B. 121.

A decree for more than \$500 obtained in a State court in an action instituted after the commencement of the proceedings in bankruptcy, is not a provable debt. *In re J. W. Maybin*, 15 B. R. 468.

**Torts and Damages.**—A claim for damages for a purely personal injury is not provable, unless liquidated and transmitted into a legal debt



by a judgment obtained before the adjudication of bankruptcy. In *re Hennocksburgh & Block*, 7 B. R. 37; s. c. 6 Ben. 150.

A mere verdict in an action for a personal tort is not a provable debt. *Black v. McClelland*, 12 B. R. 481; s. c. 7 C. L. N. 420.

A judgment entered after the commencement of the proceedings in bankruptcy upon a verdict rendered before that time in an action for a personal tort, is not a provable debt. *Ibid.*

A judgment for a fine imposed by law for the commission of a crime is not provable. A judgment that a party pay a fine, in the absence of anything to the contrary, must be presumed to have been given as a punishment for the commission of a crime. In *re Sutherland*, 3 B. R. 314; s. c. 1 Deady, 416.

A penalty incurred by the bankrupt in selling matches without stamps is a provable debt. In *re Louis H. Rosey*, 8 B. R. 509; s. c. 6 Ben. 507.

A claim of the United States for the value of goods imported contrary to the revenue laws is a provable debt. *Barnes v. U. S.*, 12 B. R. 526; s. c. 21 I. R. R. 212; in *re Theodore Vetterlein*, 13 Blatch. 44.

If the bankrupt wrongfully converted the property of another while he was legally in possession thereof, a claim for damages for the conversion constitutes a provable debt. *Cole v. Roach*, 10 B. R. 288; s. c. 37 Tex. 413.

If the bankrupt converts an acceptance to his own use and has it discounted, the owner may prove for the full value of the acceptance, although the bankrupt is also liable as indorser to the holder. In *re Morse & Co.*, 11 B. R. 482.

If the original ground of action is founded on contract, but the immediate cause of the action arises ex delicto, and is a claim for damages unliquidated by an express agreement, it is not a provable claim. *Dusar v. Murgatroyd*, 1 Wash. 13.

A decree for damages in a suit for the specific performance of a contract is a present debt, and, therefore, provable, although the amount remains to be liquidated by the master. *Boyd v. Vanderkemp*, 1 Barb. Ch. 273.

If there has been a trial in an action for damages arising from a breach of a contract and a report of the judge fixing the amount of the damages and a taxation of the costs, so that the whole amount due has been ascertained, the demand is provable. *Monroe v. Upton*, 50 N. Y. 593; s. c. 6 Lans. 255.

Where a claim originates in contract, although fraudulently induced, and is prosecuted in an action sounding in damages, it constitutes a provable debt, although the fraud must be proved in order to recover. In *re Henry Schwarz*, 15 B. R. 330; s. c. 52 How. Pr. 513.

A liability to an action for deceit on account of a misrepresentation of the condition of the bankrupt's firm is not a provable debt. In *re Frederick Schuchardt*, 15 B. R. 161.

A representation made by one member of a firm to a person who subsequently purchases commercial paper of the firm from a third person, without any intimation that the latter intends to make such pur-

chase, does not render the partner liable individually although it is false. *Ibid.*

A judgment obtained for a breach of a promise to marry is provable. *In re Sidle*, 2 B. R. 220; *In re Daniel Sheehan*, 8 B. R. 345.

At the common law, except in the case of judgments in certain inferior courts, the record and judgment remain in the court in which the judgment is entered after, as well as before, writ of error, a transcript merely being sent up. The judgment is in no manner superseded, invalidated or affected by the pendency of the writ of error. The execution only is stayed or superseded by giving bond. The judgment is a provable debt. *In re Daniel Sheehan*, 8 B. R. 345.

Where the claim is for unliquidated damages, there must be an assessment of the damages by the court before the claim can be proved. The court is not called upon to order an assessment unless the creditor applies for the same. *In re Clough*, 2 B. R. 151; s. c. 2 Ben. 508.

A claim for losses arising from the failure of the bankrupt to accept goods purchased by a broker in his own name for the bankrupt is a claim for unliquidated damages, and can not be proved without an assessment. *In re W. Fleming Smith*, 6 Ben. 187.

ACT OF 1867, § 5068. In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.

Statute revised — March 2, 1867, ch. 176, § 19, 14 Stat. 525. Prior Statutes — April 4, 1800, ch. 19, § 39, 2 Stat. 32; Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

The only contingent debts and contingent liabilities allowed to be proved are those contracted by the bankrupt. *Zimmer v. Schlechauf*, 11 B. R. 313; s. c. 115 Mass. 52.

A bankruptcy law may be so framed as to avoid and annul all contracts existing at the time of the bankruptcy, whether the liability of the bankrupt upon such contracts was fixed at the time of the bankruptcy or depended entirely upon contingencies which might afterward arise. *Shelton v. Pease*, 10 Mo. 473.

The phrase "contingent debt" means not demands whose existence depends on a contingency, but existing demands upon which the cause of action depends on a contingency. *French v. Morse*, 68 Mass. 111.

The term contingent demand is inapplicable where a present claim exists or where it is certain to arise in future, and is only appropriate when

there is no claim in praesenti, and when it is uncertain whether any in fact will arise. *Jemison v. Blowers*, 5 Barb. 686.

It is necessary to distinguish between a contingent demand and a contingency whether there ever will be a demand. *Woodard v. Herbert*, 24 Me. 358.

The contingent demands provided for by the statute are those contingent demands which are in existence as such, and in such a condition that their value can be estimated. *Ibid.*

Every joint debtor has a demand against his codebtor contingent upon his being compelled to pay more than his share of the debt, and such demand is provable. *Dean v. Speakman*, 7 Blackf. 317; *Frentress v. Markle*, 2 Greene, 553; *Clarke v. Porter*, 25 Penn. 141.

As long as it remains wholly uncertain whether a contract or engagement will ever give rise to an actual duty or liability, and there is no means of removing the uncertainty by calculation, such contract or engagement is not provable. A covenant for an indefeasible title in fee can not be proved when the claim consists merely of a contingent right of dower in the wife of one of the former owners of the property. *Riggin v. Maguire*, 8 B. R. 484; s. c. 15 Wall. 549.

If a party placed property in the hands of the bankrupt at the time of signing a bond to obtain a release thereof from an attachment under an agreement that it should be held until the liability on the bond was terminated, the claim is not provable if the attachment is not dismissed until after the granting of a discharge. *Jacobson v. Horne*, 52 Miss. 185.

This provision has no application to a claim for storage which arose after the commencement of proceedings in bankruptcy, under a contract which was terminable at pleasure. There must be a debt or liability either as principal or surety, which, if the contingency has happened, or the term of credit has expired, will be ascertainable. *Robinson v. Pesant*, 8 B. R. 426; s. c. 53 N. Y. 419.

Where the payment of a debt can not be enforced until the happening of some contingency, such debt being readily estimated, may be proved; or, if the extent of a liability depends on the happening of a contingency, and such contingency is reasonably certain to happen before final dividend, the court may by some method determine the value to be placed by the claimant, on such value and admit him to prove it. *U. S. v. Throckmorton*, 8 B. R. 309; s. c. 5 C. L. N. 520; s. c. 6 Pac. L. R. 102; s. c. 18 I. R. R. 54.

A bond given by the bankrupt to obtain the delivery of property is not a provable debt, unless the decision on which the liability depends was rendered before the final dividend. *U. S. v. Rob Roy*, 13 B. R. 235; s. c. 1 Woods, 42.

The liability of the sureties of a guardian attaches whenever the guardian receives property of his ward, and becomes a debt on and to the extent of the guardian's default, and is a contingent liability. *Jones v. Knox*, 8 B. R. 559; s. c. 46 Ala. 53.

Although a ground rent deed contains a stipulation that the rent shall cease on payment of a certain sum within a certain period, yet it is not

a contingent demand. The payment of the principal sum depends wholly upon the election of the covenantee. A ground rent is an incorporeal hereditament, and can not be styled a contingent demand or a debt. *Large v. Bosler*, 3 Penn. L. J. 246.

A covenant in a deed to warrant the title against all liens or incumbrances is a provable demand. *Shelton v. Pease*, 10 Mo. 473.

A covenant against incumbrances is not a provable debt, unless the breach occurs before the discharge of the bankrupt. *French v. Morse*, 68 Mass. 111.

The grantee of land which at the time of the grant is subject to incumbrances which may defeat it, has, before eviction, a contingent demand against his grantor upon the covenant for quiet enjoyment in his deed, and the claim is provable, although the breach occurs after the commencement of the proceedings in bankruptcy. *Jemison v. Blowers*, 5 Barb. 686.

The levy of a fl. fa. on the land without more is not sufficient evidence of a breach of a warranty of title. *Williams v. Harkins*, 15 B. R. 34; s. c. 55 Ga. 172.

A note which is deposited in the hands of a third party, for the sole purpose of enabling the creditor to determine whether he will elect to abide by a certain contract and receive the note, is a contingent claim. *Spalding v. Dixon*, 21 Vt. 45.

A promise to pay when the debtor becomes able, is a contingent demand. *Kingston v. Wharton*, 2 S. & R. 208.

A policy of insurance is provable, although the loss does not occur until after the commencement of the proceedings in bankruptcy, for it is a contingent liability. *In re American Glass Ins. Co.*, 12 B. R. 56.

If a policy of insurance contains a stipulation that the insured may surrender it any time, and that thereupon the company shall retain the customary short-time rates of premium for each month entered upon before the surrender, the provable debt is the difference between the premium originally paid in advance, and such sum as would have been payable according to the tariff of short-time rates for the time that elapsed before the surrender, counting a month which has been begun as a whole month. *Ex parte Derry Mills*, 7 A. L. Rev. 573.

The proof of the debt is deemed equivalent to the commencement of a suit, within the spirit and meaning of the "year clause," and a failure or neglect to make such proof, or bring a suit within twelve months from the time when the loss occurred, bars the claim as effectually as would the failure to sue if the company were not in bankruptcy. *In re Fireman's Ins. Co.*, 8 B. R. 123; s. c. 3 Biss. 462.

If a loss upon a policy has been duly and regularly adjusted in good faith before the company is adjudicated a bankrupt, the claim can be proven like any other debt, without regard to the "year clause" of the policy. *Ibid.*

If the preliminary proofs are not submitted or acted upon until after the petition is filed in bankruptcy, the assured, in order to preserve his claim, must not only present his preliminary proofs, but must also make

his proof in bankruptcy as the equivalent or substitute for the commencement of a suit within twelve months. The assignee has no right to make an express promise to pay the loss as adjudged, and the law will not imply one against him from what he may do. If the assured fails to follow up the preliminary proof by proving his debt in bankruptcy, his claim will be barred by the "year clause." *Ibid.*

It is the duty of the assured to furnish such preliminary proof as the terms of his policy require, and bring himself within the terms of his contract. The assignee can make no waiver of such proof. His duty requires him to allow and pay no claim for losses, unless the assured first furnishes all the proofs, and submits, on request, to the examination provided for. As an officer of the court, he can allow no claim or debt upon his own information or knowledge, and can waive the performance of no condition which the assured is bound to perform in order to vitalize his demand. Even where proofs have been furnished, and losses adjusted before adjudication, especially if such adjustment was made after the intervention of actual insolvency, it would undoubtedly be the right and duty of the assignee to examine and revise such proofs and adjustment, and call for further proof if the claim was not clearly made out, or there was any evidence of the lack of entire good faith in the adjustment. *Ibid.*

Where there is clear evidence of the waiver of the preliminary proof by the company prior to the filing of the petition, shown in the proof of debt, the claim should be allowed, subject to the right of the assignee to have inquiry made into all the facts touching such alleged waiver. *Ibid.*

The clause, "loss, if any, payable at the same time and pro rata with the insured" in a policy of reinsurance, means that the reinsuring company shall not pay any more loss than the original company is liable for—that is, the reinsuring company is to have the benefit of any deductions, by reason of other insurance or salvage, that the original company would have, and also to have the benefit of any time for delay which the original company might claim, so that the liability of the reinsuring company shall be coextensive only with the liability of the original company. The claim of the company primarily liable against the reinsuring company is not limited by its ability to meet its obligations to its original policy-holders. It may, therefore, prove for the full loss, although it has only paid a certain per cent. to the original policy-holders. *In re Republic Ins. Co.*, 8 B. R. 197; s. c. 3 Biss. 504.

If a policy is to be void unless the premium note is paid, and the vessel is stranded after the maturity of the note and before its payment, the holder has no claim, although the vessel could have been saved if a storm had not arisen after the payment of the note. *Cardwell v. Republic Fire Ins. Co.*, 12 B. R. 253; s. c. 7 C. L. N. 282.

If the company that granted a reinsurance receives copies of the preliminary proofs from the company that granted the original policy without objection, this is a waiver of any right to demand original proof. *In re Republic Ins. Co.*, 8 B. R. 197; s. c. 3 Biss. 504.

ACT OF 1867, § 5069. When the bankrupt is bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, but his liability does not become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability becomes fixed and before final dividend is declared.

Statute revised — March 2, 1867, ch. 176, § 19, 14 Stat. 525. Prior Statute — Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

A claim against a bankrupt as drawer, indorser, surety, bail, or guarantor, can not be proved before the liability has become fixed. Until that time, it is not regarded as a debt due and payable, or even as a debt existing but not payable until a future day, so as to be provable. In re Loder, 4 B. R. 190; s. c. 4 Ben. 305.

To charge the bankrupt as indorser upon a note payable upon demand, the note must be presented for payment within a reasonable time. A demand after the lapse of more than four years is not sufficient. In re Crawford, 5 B. R. 301.

If a note is passed to the holder for a loan made by him to the bankrupt who indorses it, the claim is provable, whether the note is negotiable or not. In re Granger & Sabin, 8 B. R. 30.

If a party intending to take the property of a corporation and pay its debts, buys one of its notes, this does not release the indorser. In re Elliott Felting Mills, 13 B. R. 160.

A representation that a note has been paid does not operate as an estoppel in favor of an indorser unless there has been some actual loss. *Ibid.*

The giving of time to a maker does not release an indorser, unless there was a valid contract which could be enforced. *Ibid.*

A valid agreement for extension of time between the holder of a note and the maker, without reservation, discharges the indorser. If a valid extension is shown, the burden is upon the holder to prove a reservation of all rights and remedies against the indorser. Such agreement must be express, and made at the time and as a part of the transaction. In re Granger & Sabin, 8 B. R. 30.

Whenever an indorser's liability has become fixed, such liability constitutes a debt due and payable from him, and may be proved against his estate. In re Nickodemus, 3 B. R. 230; s. c. 1 L. T. B. 140; s. c. 2 C. L. N. 49; s. c. 16 Pitts. L. J. 233; in re Cram, 1 B. R. 504; s. c. 1 L. T. B. 65.

But when a payment has been made, the unpaid balance is all that can be proved. When the payment consists of property, the title to which has become absolute in the creditor by foreclosure, the debt can not be proved until an assignee has been elected and has fixed the value of the property. In re Cram, 1 B. R. 504; s. c. 1 L. T. B. 65.

Indorsers who are liable in the second instance are included in the statute, and such a claim is provable. *McNeil v. Knott*, 11 Ga. 142,

If the holder of a note indorses it to be liable in the second instance, the right of action accrues immediately upon the indorsement if the maker has paid the note while in the hands of a prior holder. *Ibid.*

A party who takes an accommodation note indorsed for the benefit of the maker as collateral security for an antecedent debt, without any notice of any want of consideration, is a bona fide holder for a valuable consideration, and may prove the claim against the indorser. *Fogg v. Stickney*, 11 B. R. 187.

A jail bond is not a provable debt or claim, either against the debtor or his bail, unless there has been a breach of the condition prior to the commencement of the proceedings in bankruptcy. *Dyer v. Cleveland*, 18 Vt. 241.

A guaranty that if a claim can not be recovered from the debtor, the guarantor will pay it, is a provable debt. *Stone v. Miller*, 16 Penn. 450.

A bond given to release a debtor from arrest, and conditioned that he will, within fifteen days after the term at which judgment may be rendered, notify the creditor for the purpose of disclosure and examination, is not a demand provable against the surety where the judgment is rendered after the commencement of the proceedings in bankruptcy. *Woodard v. Herbert*, 24 Me. 358.

The omission to file an account is a mere formal breach of a probate bond, and furnishes a claim for nominal damages only, and so is not a claim provable against the surety. *Loring v. Kendall*, 67 Mass. 305.

A sheriff who holds a bond of indemnity against liability for executing a *fi. fa.* has a provable debt if judgment was rendered against him in an action by the owner of the goods prior to the commencement of the proceedings in bankruptcy. *Wartmough v. Gilliams*, 1 Phila. 572.

Where principal on debt is insolvent the sureties, in respect to their liability, are regarded in equity as creditors, and may retain any funds of principal in their hands, even against an assignee for value without notice. *In re Wm. P. Reynolds*, 16 B. R. 158.

A former partner or joint covenantor with the bankrupt who is liable for joint debts and pays them may prove the amount against the assets of his former partners or cocontractors. *Ex parte Lake et al.*, *In re Whiting et al.*, 16 B. R. 497.

Prior to commencement of proceedings the bankrupt sold his interest in the firm to E., his partner, at the same time agreeing to pay all the firm debts, and to indemnify E. against any liability thereon; Held, that as between themselves the bankrupt became the principal debtor, and E. surety for him as to all the debts of the firm, and that E. could not make proof for the respective differences between the total amount of the firm debts and the dividends which the estate will pay thereon as a contingent debt, when he has not paid any part of such differences. *In re Phelps*, 17 B. R. 144.

This provision contemplates two cases. 1st. Where the whole debt has been paid, and the creditor satisfied by the surety, the latter may prove the debt, or, if it has already been proved by the creditor, the surety

may stand in the place of the latter. 2d. Where the surety has not paid the whole debt, but is still liable for the same or any part thereof, he may, if the creditor shall fail or omit to prove such debt, prove the same either in the name of the creditor or otherwise. It is evident that the debt to be proved by the surety in the latter case is not the indebtedness of the bankrupt to him for the amount which may have been paid by him, but the whole indebtedness of the bankrupt to the creditor. This provision is the necessary consequence of the preceding clause, and indispensable for the protection of the surety, for if he has not satisfied the whole debt, he can not prove under the first clause, and if the creditor who has been in part satisfied, should choose not to prove, the surety who has paid part, and is liable for the balance, would be deprived of all share in the bankrupt's estate. The two clauses together secure the attainment of justice in all cases. By the first the surety who has discharged the debt, is subrogated to the right of the creditor whom he has paid. By the second the creditor may prove the whole debt. The surety can not in such case prove, for that would be to allow the same debt to be proved, in part, twice. But if the surety has paid part, the creditor, after receiving in dividends, satisfaction of the balance due him, will hold as trustee for the surety, any dividends received by him in excess. If the creditor omits to prove, the surety may do so, and will hold any dividends he may receive to meet his liability to the original creditor. The estate will thus pay dividends only on the true amount of the indebtedness, the creditor, who has the double security of the bankrupt's liability, and that of the surety, will be satisfied, while the surety will be reimbursed, either through the creditor, if he proves, or directly by himself, proving the debt in the creditor's name, that portion of the debt he has paid, or is liable for, to which as a creditor of the bankrupt he is entitled. This result, however, can only be attained by allowing the creditor who has been partly paid by the surety to prove and receive dividends on the whole debt, or the surety, who in case of omission by the creditor proves in his name, to make like proof and receive like dividends. In *re Ellerhorst & Co.*, 5 B. R. 148.

A surety has a provable claim against the principal, although he has not paid the debt for which he is liable. *Mace v. Wells*, 7 How. 272; s. c. 17 Vt. 503; *Kyle v. Bostick*, 10 Ala. 589; *Fulwood v. Bushfield*, 14 Penn. 90; *Tubbs v. Williams*, 9 Ired. 1; *Morse v. Hovey*, 1 Sandf. Ch. 187; s. c. 1 Barb. Ch. 404. Contra, *McMullen v. Bank*, 2 Penn. 343; *Cake v. Lewis*, 8 Penn. 493.

A surety has a provable debt against the principal, although the debt does not fall due until after the commencement of the proceedings in bankruptcy. *Crafts v. Mott*, 4 N. Y. 603; s. c. 5 Barb. 305.

The claim of an indorser against the principal is provable, although the indorser does not pay the note until after the commencement of the proceedings in bankruptcy. *Hardy v. Carter*, 8 Humph. 153; *Tunno v. Bethune*, 2 Dessau. 285.

If the drawer is not a cosurety with the payee of a bill of exchange drawn for the accommodation of the acceptor, the claim of the payee is a provable debt. *Dunn v. Sparks*, 7 Ind. 490.



An accommodation maker who has not paid the note can not prove his claim if the holder has proved the note, for the demand can not be twice proved. *In re Morse & Co.*, 11 B. R. 482.

The solvent partner stands in the relation of a surety to the bankrupt for the firm debt, and may prove for the latter's share of the indebtedness upon showing simply that he stands liable for payment. *Butcher v. Forman*, 6 Hill, 583.

If a party who is liable with the bankrupt as a maker of a joint and several note, is merely surety for the bankrupt, and takes up the note by giving the holder his own individual note, he is entitled to prove his debt. *In re Geo. P. Morrill*, 8 B. R. 117; s. c. 2 Saw. 356.

A second indorser upon a note of the bankrupt is entitled to prove the claim by way of security against the possible responsibility of any of the parties personally liable, and then his right to share in the dividends will depend upon his having paid any or all of the note. *In re Henry B. Montgomery*, 3 B. R. 426; s. c. 3 Ben. 565.

If the creditor has proved the claim, the surety may apply to the court for an order that the proof shall stand for his benefit to the extent of the payments made by him thereon. *Downing v. Traders' Bank*, 11 B. R. 371; s. c. 2 Dillon, 136.

This clause does not authorize proof by the party so liable, only in a case where the real creditor could prove his claim. *Sigsby v. Willis*, 3 B. R. 207; s. c. 3 Ben. 371; s. c. 1 L. T. B. 71.

A bond conditioned for the faithful performance of the duty of a public officer, is not, prior to breach, a debt either in present or in futuro, and is not provable against the surety. *Loring v. Kendall*, 67 Mass. 305; *Turner v. Esselman*, 15 Ala. 690.

As between cosureties no claim exists until payment has been made upon the debt by one of them. There is no existing liability from one surety to the other, until that event. If the payment is not made until after the final dividend, there is no claim, contingent or otherwise, that can be proved. *Swain v. Barber*, 29 Vt. 292; *Dunn v. Sparks*, 1 Ind. 397. *Contra*, *Tobias v. Rogers*, 13 N. Y. 59.

The claim of a surety against his cosurety, on an official bond for money which the former was compelled to pay after the final dividend, is not a provable debt, although the breach occurred before that time. *Goss v. Gibson*, 8 Humph. 197; *Dole v. Warren*, 32 Me. 94.

If the bankrupt puts another in possession of premises leased by him, but agrees to be accountable for the rent until they are relet, the claim for rent is provable. *In re Cosmore G. Bruce*, 6 Ben. 515.

A covenant to pay the debt due to another, is for a debt certain or capable of being reduced to a certainty, and is provable. *Murray v. De Rottenham*, 6 Johns. Ch. 52.

#### ACT OF 1898, CH. 6, § 57. Individual Sureties, Rights of.—

(i) Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove

such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

ACT OF 1867, § 5070. Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor if the creditor has proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the general orders, and subject to such regulations and limitations as may be established by such general orders.

Statute revised — March 2, 1867, ch. 176, § 19, 14 Stat. 525. Prior Statute — Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

A surety upon an official bond has no claim against the officer until he has suffered an injury in consequence of becoming surety. *Ellis v. Ham*, 28 Me. 385.

The claim of a surety on an official bond, arising from the neglect of the officer, is not a provable demand against the principal when there is no proof that he has not faithfully discharged all his official duties, although he at the time has actually been guilty of official neglect. *Ibid.*

A bond to indemnify a party against a mortgage signed by the creditor jointly with the bankrupt is a provable debt, although the installments which the holder is compelled to pay fall due after the commencement of the proceedings in bankruptcy. *Crafts v. Mott*, 4 N. Y. 603; s. c. 5 Barb. 305.

A creditor who holds a note made for the accommodation of the bankrupt, and indorsed by him, and upon which, under the authority of the court, he has effected a settlement with the maker at forty cents on the dollar, without prejudice to his rights against the bankrupt, can only prove for the balance against the bankrupt's estate. *In re Howard, Cole & Co.*, 4 B. R. 571; s. c. 2 L. T. B. 161.

If a creditor holding a draft drawn by the bankrupt and accepted for his accommodation, receives a part payment from the acceptor without prejudice, after the commencement of proceedings in bankruptcy, he may prove the whole amount of the draft against the estate, and at most will only be liable to be treated as proving in part for the benefit of the acceptor. *Downing v. Traders' Bank*, 11 B. R. 371; s. c. 2 Dillon. 130.

Where an indorser pays a certain sum in discharge of his liability on a note, the holder may prove the full amount against the estate of the

maker without giving credit for what he receives from the indorser. The legal effect of the transaction is an agreement not to sue the indorser, and the holder remains the owner of the whole debt in trust to collect it from the principal debtor and to pay the remainder of his own demand first, and to then turn the balance over to the indorser, who has a right to be indemnified subject only to the holder's better title. *Ex parte Talcott*, 9 B. R. 502.

§ 5071. Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

Statute revised — March 2, 1867, ch. 176, § 19, 14 Stat. 525. Prior Statute — Aug. 19, 1841, ch. 9, § 5, 5 Stat. 441.

The words "the time of bankruptcy" mean the time when the petition was filed, to which time the adjudication relates. Rent for the time after the commencement of proceedings in bankruptcy is not a provable debt. Where an article is purchased, the consideration is, or is assumed to be executed, while in the case of rent the consideration is assumed to be not executed, but executory, the use and occupation being in futuro. *May v. Merwin*, 9 B. R. 419; s. c. 47 How. Pr. 37; s. c. 7 Ben. 238; *Bailey v. Loeb*, 11 B. R. 271; s. c. 2 Woods, 578; in re *Lynch & Bernstein*, 7 Ben. 26; in re *Peter Hufnagel*, 12 B. R. 554.

Rent accruing after bankruptcy can not be brought in question in the bankruptcy court. *Wylle v. Breck*, 2 Woods, 673.

Rent should be allowed only up to the time of the commencement of the proceedings in bankruptcy, and not to the time of the adjudication. *Ibid.*

Rent should be allowed from the commencement of the term, although the terms begins before the date of the lease. *Ibid.*

Where the property has been condemned for public uses, and a certain sum allowed to the bankrupt, upon the theory that he would remain liable for the rent till the termination of the lease, the landlord may prove a claim for the full rent, with a proper rebate of interest. In re *John Clancy*, 10 B. R. 215.

Whenever the law gives a creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt. Rent is a lien under the statutes of Maryland, Virginia, Kentucky, New Jersey, South Carolina, Mississippi, Georgia, and Louisiana. In re *Wynne*, 4 B. R. 23; s. c. *Chase*, 227; s. c. 2 L. T. B. 116; in re *Dunham & Hawkes*, 7 Phila. 611; in re *Trim et al.*, 5 B. R. 23; in re *Webb & Co.*, 6 B. R. 302; *Walker v. Barton*, 3 B. R. 265; s. c. 1 L. T. B. 625; *Marshall v. Knox*, 8 B. R. 97; s. c. 16 Wall. 551; *Austin v. O'Riley*, 12 B. R.

329; s. c. 8 B. R. 129; s. c. 2 Woods, 670. *Contra*, *Bailey v. Loeb*, 11 B. R. 271; s. c. 2 Woods, 578; *Loudon v. Blanford*, 56 Ga. 150.

The lien is not waived by a mere agreement to forbear to distrain upon the condition that the property shall be kept upon the premises.\* *Walker v. Barton*, 3 B. R. 265; s. c. 1 L. T. B. 625.

Where the statute of 8 Anne, ch. xiv, or similar statutory provisions prevail, the landlord, by making a demand upon the assignee, before the removal of the goods, for an amount not exceeding a year's rent, is entitled to priority of payment, whether the right of distraining exists or not. *In re Appold*, 1 B. R. 621; s. c. 6 Phila. 469; s. c. 1 L. T. B. 83; *Walker v. Barton*, 3 B. R. 265; s. c. 1 L. T. B. 625; *in re Trim et al.*, 5 B. R. 23; *Longstreth v. Pennock*, 20 Wall. 575; s. c. 7 B. R. 449; s. c. 12 B. R. 95; s. c. 9 Phila. 394. *Contra*, *in re H. L. Butler*, 6 B. R. 501; s. c. 19 Pitts. L. J. 146.

If a trustee under an assignment for the benefit of creditors sells the goods after the commencement of the proceedings in bankruptcy, and delivers the proceeds to the assignee, the landlord is entitled to priority of payment out of the same. *In re Bowne & Ten Eyck*, 12 B. R. 529.

If an execution is issued before the commencement of the proceedings in bankruptcy, the landlord is entitled to a priority for the rent in arrear, although the levy was not made nor notice of the rent given to the sheriff until after that time. *Barnes' Appeal*, 13 B. R. 543; s. c. 76 Penn. 50.

If the lease contains a provision that the whole rent for the term shall become due and payable whenever the lessee attempts to remove the property without paying the same, and that distraint may issue therefor, a distress for the rent on the happening of the contingency is valid. *Goodwin v. Sharkey*, 15 B. R. 526; s. c. 80 Penn. 149.

The landlord's right to rent against the bankrupt's estate expires on the day of adjudication. *In re Webb & Co.*, 6 B. R. 302.

Under the statutes of Illinois, a distress for rent is in the nature of an attachment upon mesne process. Hence, the assignee of a bankrupt tenant is vested with all the property of the tenant upon which a distress warrant has been issued and levied, prior to the granting of the certificate of the court to the officer of the amount due from the tenant, and assessed and entered of record. But where the right of the landlord has been exercised by the issuing and levy of the warrant, and filing a copy of that and of the inventory of the goods before the magistrate, or in the proper court, and the obtaining of the certificate of the amount found due, the landlord has a priority over the general creditors. Where no distress warrant has been issued prior to the filing of the petition in bankruptcy, the landlord can have no priority or preference over the general creditors. *In re Joslyn et al.*, 3 B. R. 473; s. c. 2 Biss. 235; *Morgan v. Campbell*, 11 B. R. 529; s. c. 22 Wall. 381.

A mortgage to secure the rent under a lease which provides for its termination, if the assignee, in case of the bankruptcy of the lessee, shall not accept the lease within ten days after his appointment, is a security for the payment of the rent up to the time when the assignee elects not

to take the lease, although more than ten days have elapsed. In re R. F. Yeaton, Lowell, 420.

If a chattel mortgage executed in pursuance of the terms of a lease is void under the recording laws of the State, the lessor has neither a legal nor an equitable lien. *Platt v. Stewart*, 13 Blatch. 481.

Where a lease stipulates that all unpaid rent shall be a mortgage lien upon the property on the premises, it creates an equitable lien that is valid against the assignee. *McLean v. Klein*, 3 Dillon, 113.

A lease containing a covenant that the lease shall operate as a mortgage upon all property placed on the premises to secure the rent accruing thereunder, is void as against the creditors of an assignee of the lease, although it is properly recorded as a chattel mortgage, unless it is accompanied by some evidence or notice that he holds the premises subject thereto. In re *Dyke & Marr*, 9 B. R. 430.

All right to priority under a lease which stipulates that the rent shall be a lien on the property placed on the premises, and gives the landlord the power to take possession thereof, is terminated if the assignee takes possession before the landlord does. *Ibid.*

A lease which contains a covenant that the lease shall constitute a mortgage on the property placed on the premises to secure the rent accruing thereunder, is void unless it is properly recorded as a chattel mortgage. *Ibid.*

If the assignee elects not to accept the lease, the landlord can not prove for the damages suffered by him in reletting the premises. Future rent is not a contingent debt or liability. There is no right of action at the time of the bankruptcy, except for the arrears. *Ex parte Houghton et al.*, Lowell, 554.

If the landlord re-enters, under a power contained in the lease, such entry puts an end to the term, and to all claim for future rent. *Ibid.*

Damages for alterations, made in violation of a covenant contained in a lease, constitute a provable demand. *Ibid.*

A covenant to pay taxes assessed during the term, where they are assessed as of the first day of May in each year, includes only those taxes which were assessed in the months of May during the continuance of the term. *Ibid.*

If the bankrupt, as sublessee, covenants to pay the taxes, and they are assessed to the owner of the estate, the claim of the mesne landlord, if he pays them, is not entitled to preference, because, as between the parties, it rested in contract merely, and was, to all intents and purposes, a part of the rent. As the taxes were not assessed to the bankrupt, the State had no right to prove them in bankruptcy. *Ibid.*

If the landlord takes a note for the rent which is not paid at maturity, he is entitled to all his remedies for the security or collection of the debt in the same manner as if the note had never been given. In re *Bowne & Ten Eyck*, 12 B. R. 529.

A distress warrant can not be issued against the property of the bankrupt after the commencement of proceedings in bankruptcy. No lien

can be acquired or enforced by any proceedings in a State court after the petition has been filed. In *re Wynne*, 4 B. R. 23; s. c. *Chase*, 227; s. c. 2 L. T. B. 116; *Brock v. Terrell*, 2 B. R. 643; *Morgan v. Campbell*, 11 B. R. 529; s. c. 22 Wall. 381.

Until an assignee in bankruptcy elects to accept a lease as assignee he does not become liable for rent accruing after the adjudication and assignment in bankruptcy. In *re Ten Eyck & Choate*, 7 B. R. 26.

Occupation of the premises, independently of the lease, is not evidence of an election to accept it. *Ibid.*

Merely allowing the bankrupt's goods to remain on the premises does not alone prove an acceptance of the lease, especially when the key is sent back to the lessor, which is an unequivocal act of renunciation. In *re R. F. Yeaton*, *Lowell*, 420.

If the assignee rejects the lease, and the bankrupt collects rents from a subtenant, the district court, on the application of the lessor, may direct that such subrents shall be applied to pay so much of the original rent as is provable in bankruptcy. *Wylie v. Breck*, 2 Woods, 673.

If a joint lease to the bankrupt and another reserves the right to re-enter for the nonpayment of the rent, and the tenants, by a subagreement, apportion the property and the rent among themselves, the tenants will be entitled to as full use of the whole premises as the assignee, until the latter pays in full what the bankrupt was to pay by the subagreement in order to enjoy the exclusive use of his part as against the solvent tenant. But the solvent tenant is not entitled to the exclusive use of the entire premises until the assignee pays the arrears of rent. In *re Hotchkiss*, 9 B. R. 488; s. c. 7 Ben. 235.

Rent for the use of premises to store goods of the bankrupt, from the time of the commencement of proceedings in bankruptcy to the date of surrender, should be paid by the assignee, and charged as a part of his expenses. In *re Walton*, 1 B. R. 557; s. c. 1 Deady, 598; s. c. 1 L. T. B. 162; in *re Appold*, note, 1 B. R. 621; s. c. 6 Phila. 469; s. c. 1 L. T. B. 83; *Walker v. Barton*, 3 B. R. 265; s. c. 1 L. T. B. 625; in *re Merrifield*, 3 B. R. 98; in *re Laurie*, *Blood & Hammond*, 4 B. R. 32; s. c. *Lowell*, 404; in *re Dunham & Hawkes*, 7 Phila. 611; in *re Webb & Co.*, 6 B. R. 302; in *re H. L. Butler*, 6 B. R. 501; s. c. 19 Pitts. L. J. 146; in *re Lynch & Bernstein*, 7 Ben. 26; in *re Peter Hufnagel*, 12 B. R. 554.

The landlord is not entitled necessarily as a question of law to full rent of the premises from the commencement of the proceedings in bankruptcy to the date of the surrender. In *re Lynch & Bernstein*, 7 Ben. 26.

A landlord has no lien on the goods on the premises for the rent that accrues after the commencement of proceedings in bankruptcy, for the debt is not provable. *Bailey v. Loeb*, 11 B. R. 271; s. c. 2 Woods, 578.

The fact that an injury to the building was prevented by not removing the machinery, is not a circumstance that can be considered in determining the amount of the compensation for the use of premises. In *re Breck & Schermerhorn*, 12 B. R. 215; s. c. 9 Pac. L. R. 242.

A reasonable compensation may be allowed to the landlord for the use of premises after the commencement of the proceedings in bankruptcy.

where the estate has received a benefit to that amount. *In re Breck & Schermerhorn*, 12 B. R. 215; s. c. 9 Pac. L. R. 242; *in re Hamburger & Frankel*, 12 B. R. 277.

If the landlord desires to obtain compensation equal to the rent offered by other persons, he should ask the court to sanction the rate of rent or give up the premises. It is not enough to ask possession or rent from the marshal. *In re Joseph Metz*, 6 Ben. 571.

A covenant to pay taxes upon a certain piece of ground as to all taxes imposed after the discharge can not be proved. *Murray v. De Rottenham*, 6 Johns. Ch. 52.

A claim for storage which accrued after the commencement of proceedings in bankruptcy, is not a provable debt. *Robinson v. Pesant*, 8 B. R. 426; s. c. 53 N. Y. 419.

ACT OF 1867, § 5072. No debts other than those specified in the five preceding sections shall be proved or allowed against the estate.

Statute revised — March 2, 1867, ch. 176, § 19, 14 Stat. 525.

The provisions in regard to what debts may be proved are arbitrary, but do not affect the existence or validity of such debts as are not provable, nor does a discharge release them. If a debt is provable, it comes in for a dividend, and can, unless it is an excepted debt, be discharged. If it is not provable, it does not come in for a dividend, and will not be discharged. *May v. Merwin*, 9 B. R. 419; s. c. 47 How. Pr. 37; s. c. 7 Ben. 238.

If creditors whose debts arose subsequent to the bankruptcy were permitted to share with those whose demands accrued before, the latter would be exposed to the hardship of having only a dividend in bankruptcy, while the former, besides an equal dividend, would retain a remedy for the residue against the bankrupt himself and his future property. The privilege, therefore, of creditors to prove and of the bankrupts to be discharged from debts is wisely made coextensive and commensurate. *Rathbone v. Blackford*, 1 Caines, 588.

ACT OF 1898, CH. 7, § 68. **Set-offs and Counterclaims.**—(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

(b) A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a

view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

ACT OF 1867, § 5073. In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed in favor of any debtor to the bankrupt of a claim in its nature not provable against the estate, or of a claim purchased by or transferred to him after the filing of the petition,<sup>1</sup> or in cases of compulsory bankruptcy, after the act of bankruptcy upon or in respect of which the adjudication shall be made, and with a view of making such set-off.

Statute revised — March 2, 1867, ch. 176, § 20, 14 Stat. 526. Prior Statutes — April 4, 1800, ch. 19, § 42, 2 Stat. 33; Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it. The debts must be mutual, and must be in the same right. *Sawyer v. Hoag*, 9 B. R. 145; s. c. 3 Biss. 293; s. c. 17 Wall. 610.

The term "debt" is fairly to be construed to mean any debt for which the act provides. A debt which may be proved, and to the owner of which a dividend must be paid, is a debt in the sense of the term as used in this section. *Tucker v. Oxley*, 5 Cranch, 34; s. c. 1 Cranch C. C. 419.

The term "mutual credits" in the bankruptcy act is more comprehensive than the term "mutual debts" in the statutes relating to set-off. The term credit is synonymous with trust, and the trust or credit need not be of money on both sides. Where a creditor has goods or choses in action of the bankrupt put in his hands before bankruptcy, by a valid contract, by the terms of which the deposit will result in a debt, as if they are deposited for sale or collection, the case of mutual credit has arisen within the meaning of the bankruptcy act. *Ex parte Caylus et al.*, Lowell, 550; *Catlin v. Foster*, 3 B. R. 540; s. c. 1 Saw. 37; s. c. 1 L. T. B. 192; *Murray v. Riggs*, 15 Johns. 571.

Upon bankruptcy of a depositor, his deposit becomes a security for the payment of his indebtedness to the bank, and such amount should be set off against the aggregate debt due in bank, not including any notes upon which the bankrupt is surety unless the principals are insolvent. *Ex parte Howard Nat. Bk.*, in re North & Co., 16 B. R. 420.

Bankrupt in a composition case in which no assignee has been appointed stands in the position of an assignee in respect to set-off. *Ibid.*

Seemle, that if the bank held mere contingent debts or liabilities, or a claim for unliquidated damages arising upon contract, it may retain the deposit until the amount of its provable debt can be ascertained, and may then use it as a set-off. *Ibid.*

<sup>1</sup> So amended by act of June 22, 1874, ch. 390, § 6, 18 Stat. 179.



Bankrupt was engaged in manufacturing flour and storing grain in an elevator attached to its mill. Defendant, prior to the bankruptcy, and in ignorance of the insolvency of the corporation, purchased a storage receipt issued by it, and subsequently demanded a delivery of the grain, which was refused. In action brought by assignee to recover money of the bankrupt which the defendant had in his possession at the time of adjudication: Held, that the value of the grain so converted might be set off. *McCabe, Assignee, v. Winship*, 17 B. R. 113.

Where set-off is founded on a duty which the plaintiff owes the defendant, the wrongful act can be waived and a set-off is proper; but where the cause of action is a tort, then the wrongful act can not be waived. *Ibid*.

Nothing can be set off against the principal of a debt due a creditor except a debt due from a creditor to the bankrupt. *In re Purcell*, 18 B. R. 447.

Where the bankrupt had given a creditor his accommodation notes to an amount larger than the claim of such creditor, which were discounted and afterward proved against the estate by the holders: Held, that an assignee would have the right to set off the dividend paid upon the notes against the dividend due such creditor, and recover from him the balance of the amount so paid — and the same equitable right obtains in the case of a composition. *Ibid*.

A bank holding a deposit of a bankrupt, and also being his creditor by a note, may receive a check from bankrupt upon itself, and surrender the note, though it has notice of bankrupt's insolvency. *Robinson v. Wisconsin M. & F. Ins. Co. Bank*, 18 B. R. 243.

A note which is subject to an offset for a larger amount is not a provable debt. *In re Ford & Co.*, 18 B. R. 426.

Stockholders of an insolvent corporation, who are also creditors, can not be allowed to deduct the amount due to them from their respective proportions of the unpaid capital; but if they prove their debts under the bankruptcy, deductions equal to their estimated respective dividends may perhaps be made from the amounts of the assignees' demands against them, as stockholders. *Wilbur v. Stockholders of the Corporation*, 18 B. R. 179.

It was held in this case that the right of stoppage in transitu still existed as to 600 cases of wine out of an original shipment of 1,500 cases, which had been stored in a bonded warehouse selected by the bankrupt, but stored in the name of the shipper, and that the giving of authorization to withdraw part of the goods was such a separation by consent of the parties of that part from the rest that a delivery of that part is not to be considered as a constructive delivery of the whole, or as affecting the right of stoppage in transitu as to the remaining part. *In re Bearns*, 18 B. R. 500.

Stockholders of an insolvent corporation who are also creditors can not be allowed to deduct the amount to them in their respective proportions of the unpaid capital, but if they prove their debts under bankruptcy, deductions equal to their estimated respective dividends may per-

haps be made from the amounts of the assignee's demands against them as stockholders. *Wilbur v. Stockholders of Corporation*, 18 B. R. 179.

A court of equity will not aid a debtor to a bankrupt's estate to set off debts bought upon a speculation of the probable dividends against the debt he owes the estate. *Hunt v. Holmes et al.*, 16 B. R. 101.

A creditor who at the time of the bankruptcy has in his hands goods or chattels of the bankrupt, with a power of sale, or choses in action, with a power of collection, may sell the goods or collect the claims and set them off against the debt the bankrupt owes him. *In re Dow et al.*, 14 B. R. 307.

A party who holds stock of the bankrupt as collateral for a certain debt which was overdue at the commencement of the proceedings in bankruptcy, may, if he has power to sell the stock, retain the surplus by way of set-off on another claim which he holds against the bankrupt. *Ibid.*

Where the same persons conduct business under two different names in different places, there is no implied ulterior lien upon the surplus of the securities deposited with one house for any deficiency in the value of the securities deposited with the other house. *Sparhawk v. Drexel*, 12 B. R. 450.

If the debtor knows that two houses are composed of the same persons, and the declarations or acts of the parties pending the business indicate a belief upon each side, that either house may control the securities deposited with the other house, an ulterior lien will attach in favor of either house upon any surplus in the value of the securities deposited with the other house. *Ibid.*

A partnership can not retain the surplus arising from the sale of securities deposited with a member of the firm to secure a loan made by him without a positive appropriation by the bankrupt to their claim, or an agreement of equivalent effect. *Ibid.*

A creditor who purchases a secured claim and receives a transfer of the securities, can not retain the surplus arising from the sale of the securities on account of his own claim. *Ibid.*

If a banker in the regular course of business receives drafts for collection, he may retain the amount so collected to pay an indebtedness due to him, although the money was collected after the commencement of the proceedings in bankruptcy. *In re Farnsworth, Brown & Co.*, 14 B. R. 148; s. c. 5 Biss. 224.

The words "mutual credit" are broad enough to include an indorser on a bill of exchange which was protested before the commencement of the proceedings in bankruptcy, although he did not pay it until afterward. *Marks v. Barker*, 1 Wash. 178.

Before an indorser can offset a liability on a draft indorsed for the bankrupt, he must show the debt to be subsisting in him alone, for the debt attempted to be set off must be a good and subsisting one at the time the action is brought. *Ibid.*

The claim may be set off by the holder, although he has never proved it in bankruptcy. *Tucker v. Oxley*, 5 Cranch. 24; s. c. 1 Cranch C. C. 419.

A stockholder can not set off a claim held by him upon the corporation

against a demand for an unpaid subscription for stock. The debts are not mutual. The debt due on the subscription is a trust fund devoted to the payment of all the creditors of the company. As soon as the company becomes insolvent, and the fact becomes known to the stockholder, the right of set-off for an ordinary debt, to its full amount, ceases. It becomes a fund belonging in equity equally to all the creditors, and can not be appropriated by the debtor to the exclusive payment of his own claim. *Sawyer v. Hoag*, 9 B. R. 145; s. c. 3 Biss. 293; s. c. 17 Wall. 610; *Scammon v. Kimball*, 8 B. R. 337; s. c. 13 B. R. 445; s. c. 5 Biss. 431; s. c. 6 L. T. B. 424; *Jenkins v. Armour*, 14 B. R. 276; s. c. 6 Biss. 312.

A claim for a loss on a policy of insurance may be set off against an indebtedness from the holder to the company for money deposited with him as a banker. *Scammon v. Kimball*, 8 B. R. 337; s. c. 13 B. R. 445; s. c. 5 Biss. 431; s. c. 6 L. T. B. 424.

If a stockholder purchases a claim against the corporation and accepts his stock note in return therefor, he is liable for interest from the date of the conversion. *Jenkins v. Armour*, 14 B. R. 276; s. c. 6 Biss. 312.

Losses upon policies of insurance may be set off against money borrowed from the insurance company. *Drake v. Rollo*, 4 B. R. 689; s. c. 3 Biss. 273.

A party who has acted under a deed of trust, for the benefit of creditors, declared void as being contrary to the provisions of the bankruptcy act, is entitled to set off the value of the services rendered by him under such deed against the claim for property that came to his hands under it, even though he did have notice of the act of bankruptcy committed by the bankrupt at the time of the rendering of the services. *Catlin v. Foster*, 3 B. R. 540; s. c. 1 Saw. 37; s. c. 1 L. T. B. 192.

A joint claim—that is to say, a debt due to several joint creditors—can not be set off against a debt due by one of them. If a debt is due to A. and B., how can any court compel the appropriation of it to pay the indebtedness of A. to the common debtor, without committing injustice toward B.? The debtor who owes a debt to several creditors jointly can not discharge it by setting up a claim which he has against one of those creditors, for the others have no concern with his claim, and can not be affected by it; and no more can one of several joint creditors, who is sued by the common debtor for a separate claim, set off the joint demand in discharge of his own debt, for he has no right thus to appropriate it. Equity will not allow him to pay his separate debt out of the joint fund. *Gray v. Rollo*, 9 B. R. 337; s. c. 18 Wall. 629; s. c. 1 A. L. T. (N. S.) 195; *Hitchcock v. Rollo*, 4 B. R. 690; s. c. 3 Biss. 276.

If A. and B. are indebted upon a joint note to a bankrupt insurance company, and B. and C. have a joint claim for a loss under a policy issued by the company, the claim under the policy can not be set off against the note, for there is neither a mutual debt nor a mutual credit. *Gray v. Rollo*, 9 B. R. 337; s. c. 18 Wall. 629; s. c. 1 A. L. T. (N. S.) 195.

The set-off can not be allowed in such a case, even though the liability on the note is several as well as joint, and C. consents to the set-off. *Ibid.*

A joint indebtedness may be proved and set off against the estate of either of the joint debtors who may become bankrupt, and the fact that it may be subject to be marshaled makes no difference. The joint debtors are severally liable in solido for the whole debt. *Gray v. Rollo*, 9 B. R. 337; s. c. 18 Wall. 629; s. c. 1 A. L. T. (N. S.) 195; *Tucker v. Oxley*, 5 Cranch, 34; s. c. 1 Cranch C. C. 419. Contra, *Wright v. Foster*, 3 McLean, 229.

The partnership is a different thing from the partners themselves, and the debts of the firm are different in character from other joint debts. A joint debt incurred by all the partners can not be set off against a demand of the firm upon the creditor who holds the joint obligation. An illegal claim can not be set off. *Forsyth v. Woods*, 5 B. R. 78; s. c. 11 Wall. 484.

An unliquidated demand against the bankrupt, as supercargo, for violating his instructions in not keeping the vessel insured, can not be set off against a demand for wages due to him and moneys advanced by him. *Brown v. Cumming*, 2 Caines, 33.

A demand against the bankrupt which has arisen since the bankruptcy can not be set off against the assignee. *Barclay v. Carson*, 2 Hay (N. C.), 243.

A bond due from the bankrupt can not be set off against a note made after the commencement of the proceedings in bankruptcy, and passed by the payee to the assignee. *McIver v. Wilson*, 1 Cranch C. C. 423.

When a plaintiff becomes bankrupt, the defendant may, even in the State courts, plead any set-off which the bankruptcy law allows. *Hunt v. Holmes*, 16 B. R. 101.

A consignee who has received goods for sale in excess of the advances made thereon, may hold such goods as a set-off against notes of the bankrupt, purchased by him in good faith, without suspicion of the consignor's insolvency. *Goodrich v. Dobson*, 43 Conn. 576.

A court of equity will not interfere by injunction to enforce a set-off, where the debt has been bought after insolvency on a speculation as to the probable dividend. *Hunt v. Holmes*, 16 B. R. 101.

A creditor who receives his composition under a resolution, thereby waives his right to set off the original debt against a judgment subsequently recovered upon a cause of action which existed prior to the commencement of the proceedings in bankruptcy. *Ibid*.

If a party fails to plead the set-off, he can not obtain relief in equity after judgment is rendered against him. *Ibid*.

If the mortgagor sets up a counterclaim in an action brought by an assignee to foreclose a mortgage, the assignee can not raise the objection that it is barred by the statute of limitations, if it was not so barred at the time of the commencement of the proceedings in bankruptcy. *Van Sachs v. Kretz*, 17 N. Y. Supr. 95.

If a partner sells his interest in real estate held by the firm to another, and takes a mortgage thereon to secure the payment of the purchase money, he will be entitled to priority over the creditors of a new firm, composed of his copartner and the purchaser, whose capital consists in

part of such real estate, although the debts of the old firm are paid in a large part with moneys due from the new firm. Nor are his rights affected by a subsequent release of the mortgage and the taking of a new one, in order to give priority to another mortgage then made to another by the firm, for the new mortgage is a mere continuation of the first one. *Beecher v. Stevens*, 43 Conn. 587.

Under the laws of Colorado a creditor obtains a lien upon the property of the debtor by a delivery of the *fi. fa.* to the sheriff. *Bartlett v. Russell*, 24 Pitts. L. J. 206; s. c. 9 C. L. N. 377.

The right of a creditor to a lien is a strict legal right, and must stand or fall by the statute which gives it. In a controversy with the assignee there are no equities in favor of the creditor. In *re Hamilton Boyd*, 16 B. R. 137; s. c. 9 C. L. N. 385.

If a judgment against two persons provides that it may be enforced against the property of one and the joint property of both, the judgment can not become a lien on the property of the other. *Ibid.*

To create a lien the docket of a judgment must be complete in itself, and can not be aided by reference to the judgment or other proceedings in the action. *Ibid.*

A docket entry which consists of mere abstract numbers, without any mark to indicate dollars, is not sufficient to create a lien. *Ibid.*

If the judgment is for gold coin, it must be so docketed. *Ibid.*

If a creditor who holds the guaranty of the firm for the debt of another, obtains judgment and makes the money out of the firm assets, one partner is not entitled to a lien on the individual estate of his copartner by right of subrogation to the creditor. In *re G. W. Smith*, 16 B. R. 113.

A party who has funds in his hands, arising from the sale of goods, may, in an action of *assumpsit* therefor, set off a claim held by him against the bankrupt, although the goods were shipped to him under a special contract, that the proceeds should be applied to another purpose, and not to such claim so held by him. *Marks v. Barker*, 1 Wash. 178.

If a party who had joined with the bankrupt in sending a vessel on a voyage, where he retained the government of the adventure, subsequently indorsed for the bankrupt without a special agreement that he should hold the bankrupt's share in the venture as security, he can not claim to retain the proceeds of the venture to reimburse himself for moneys paid on the indorsements, especially if the cargo did not come into his possession until after the commencement of the proceedings in bankruptcy. *Tunno v. Bethune*, 2 Dessau. 285.

If a party takes a deed of land in his own name, and subsequently loans his notes to the person for whose benefit he holds the title, he may retain the land until the notes are paid. *Frazer v. Hollowell*, 1 Binn. 126.

A debt payable in futuro can be set off against a debt payable in praesenti. Though there are not debts mutually payable between the parties, there are mutual credits, and the case is within the equity of the statute. In *re City Bank*, 6 B. R. 71; s. c. 4 C. L. N. 81; *Drake v. Rollo*, 4 B. R. 689; s. c. 3 Bliss. 273.

A claim for unliquidated damages can not be set off by the bankrupt

against the claim of a creditor. The creditor has the right to prove his claim in full. *In re Orne*, 1 B. R. 57; s. c. 1 Ben. 361.

Quaere, Can a party, by way of defense to an action by the assignee, plead and set off a claim which has been once presented for proof, and rejected? *Catlin v. Foster*, 3 B. R. 540; s. c. 1 Saw. 37; s. c. 1 L. T. B. 192.

When the assignee brings an action upon a demand due to the bankrupt, the defendant may plead a set-off to more or less of such demand, although the same has not been proved and presented to the assignee, and rejected by the judge, and appeal taken to the circuit court. *Ibid.*

A party has the right to have his credit for a deposit in a bankrupt bank set off against his indebtedness as indorser upon a note held by the bank and duly protested. And if the parties before bankruptcy do what the law allows, and the indorser thus takes up the note, it can not be recovered from him. *Winslow v. Bliss*, 2 Lans. 220.

A bank may set off the amount due on a protested draft, against a deposit made by the bankrupt, and need not pay such deposit to the assignee. *In re H. Petrie*, 7 B. R. 332.

Any collections in excess of the advances for which they were specifically pledged, made after the commencement of proceedings in bankruptcy, are collections for the account of the assignee, and as to them no right of set-off exists. *Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 10 Blatch. 204; s. c. 21 Wall. 360.

A creditor is entitled to retain money due to the bankrupt and apply it to his claim, although he has attempted to obtain a preference thereon, for the debt is a valid debt against the bankrupt, although it can not be proved, and the law allows and requires the set-off. *Ibid.*

A creditor who has received and sold the goods of the bankrupt under an agreement to account for the same to a committee of creditors can not set off the balance due from him on the special account against the general balance due him from the creditor. *In re Troy Woolen Co.*, 8 B. R. 412.

A claim purchased before the filing of the petition in voluntary cases, or before the act of bankruptcy upon which the adjudication was made in involuntary cases may be set off, although the purchaser knew that the debtor was insolvent. *Hovey v. Home Ins. Co.*, 10 B. R. 224; 13 A. L. Reg. 511; *in re City Bank*, 6 B. R. 71; s. c. 4 C. L. N. 81. *Contra*, *Hitchcock v. Rollo*, 4 B. R. 630; s. c. 3 Biss. 276.

A consent to an assignment of an open account given after the commission of the act of bankruptcy, but before the filing of the petition against the debtor, does not confer any higher or better rights upon the holder. *Rollins v. Twitchell*, 14 B. R. 201.

A chose in action which is not negotiable, and on which the assignee must sue in the name of the assignor, does not by assignment become a mutual debt or credit in the hands of the assignee, so as to be a matter of set-off. *Ibid.*

A party who takes a nominal transfer of a claim will be deemed to be trustee for the owner, and can not set it off against a claim due by him to the estate. *In re Lane, Brett & Co.*, 13 B. R. 43.

If a debtor makes an assignment, and afterward becomes bankrupt, an agreement made between him and one member of a firm before the assignment, that a debt due to him by the partner should be set off against a debt due by him to the firm, can not avail where the other partners only assent to it after the assignment, and some only after the commencement of the proceedings in bankruptcy. *Clark v. Sparhawk*, 2 W. N. 115.

A set-off may be allowed against the indorsee of a note who took it after the commencement of proceedings in bankruptcy against the maker, and with notice thereof, whether the note was due or not at the time of the indorsement, for the filing of the petition was legal notice that wherever mutual debts subsisted between the bankrupt and his creditors, the right of set-off attached. *Humphries v. Blight*, 4 Dall. 370; s. c. 1 Wash. C. C. 44.

A person who purchases the bankrupt's note while the proceedings in bankruptcy are pending must be deemed to have constructive notice of those proceedings, and is not a bona fide purchaser. He succeeds merely to the rights of the creditor, and can not set the note off against a claim due by him to the bankrupt. *Smith v. Brinkerhoff*, 6 N. Y. 305; s. c. 18 Barb. 519.

A party can not set off checks of the bankrupt held by him against his own note, unless he proves that he had possession of the checks at the time of the commencement of proceedings in bankruptcy, and upon this point the burden of proof rests on him, because his defense consists of a particular fact of which he is supposed to be connusant. It would be unjust if one person who happened to be indebted to another at the time of the bankruptcy, were permitted by any intrigue between himself and a third person so to change his own situation as to diminish or totally destroy the debt due to the bankrupt by an act *ex post facto*. Such an act would be a fraud on the equality of the bankruptcy act. *Ogden v. Cowley*, 2 Johns. 274.

A party who goes into a court of equity to have an assigned claim allowed as a set-off, must show that he is more than the nominal owner. *Hitchcock v. Rollo*, 4 B. R. 690; s. c. 3 Biss. 276.

If the debt owing to the bankrupt is not yet due, the creditor may file a bill in equity to obtain the set-off. *Drake v. Rollo*, 4 B. R. 689; s. c. 3 Biss. 273.

The bankruptcy of the payee of a note taken for a debt due to his principal will not affect the right of the maker to such offsets as he acquired under the honest belief that the payee was the owner of the note. *Yarborough v. Wood*, 42 Tex. 91.

Proving the entire debt in the proceedings in bankruptcy without offering to abate the claim by any set-off which the creditor may have, is a waiver of the right to do so, and an election to proceed on such claim alone in the bankruptcy proceedings, and the subsequent assertion of part of the same debt by a plea of set-off in an action against the creditor is equivalent to the prosecution of an original suit upon the claim, against the prohibition of the bankruptcy law. *Brown v. Farmers' Bank*, 6 Bush, 198; *Russell v. Owen*, 15 B. R. 322; s. c. 61 Mo. 185.

**ACT OF 1898, CH. 3, § 5. Two Partnership, or Individual and Partnership Estates.**—(g) The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

**ACT OF 1867, § 5074.** When the bankrupt, at the time of adjudication, is liable upon any bill of exchange, promissory note, or other obligation in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader and also as a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts.

Statute revised — March 2, 1867, ch. 176, § 21, 14 Stat. 526.

Two classes of persons are mentioned as embraced in this provision, to-wit: 1st, any bankrupt liable upon any bill of exchange, promissory note, or other obligation, in respect to distinct contracts, as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy; 2d, or as a sole trader and also as a member of a firm. Considered separately, the first part of the clause would afford strong support to the proposition that the term sole trader is used in a technical sense; but the whole clause must be construed together, and the last part provides that the circumstance that such firms are, in whole or in part, composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent such proof, and the receipt of dividends, and thus shows that the term sole trader is not used in a technical sense, and that its meaning was intended to be enlarged by the latter part of the clause. *Emery v. Canal Nat'l. Bank*, 7 B. R. 217; s. c. 5 L. T. B. 419.

**ACT OF 1898, CH. 6, § 56. Voters at Meetings of Creditors.**—(a) Creditors shall pass upon matter submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

(b) Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts



of such claims exceed the values of such securities or priorities, and then only for such excess.

§ 57. **Proof and Allowance of Claims.**— (e) Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.  
\* \* \*

ACT OF 1898, CH. 4, § 57. \* \* \* **Value of Securities.**— (h) The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

CH. 1, SEC. 1. \* \* \* **Secured Creditor.**— (23) "Secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets.

After adjudication, a creditor holding a mortgage for \$15,000 on bankrupt's real estate had it sold at auction, and purchased it for himself, for \$142.50, and proved for residue of mortgage as an unsecured claim. Proof allowed over objections, and he was permitted to vote for assignee, whereby a majority in value of the creditors was obtained. Held, no such mode of ascertaining value of mortgaged security is recognized by the bankruptcy act; that the register had no authority to admit the proof, and allow the vote against objection, and that the choice of assignee under such circumstances was irregular. *In re W. R. Hunt*, 17 B. R. 205.

Where the former assignee of the bankrupt, a second mortgagee, was made a party defendant in a suit to foreclose the first mortgage, and died after entry of decree pro confesso, but before final decree, and the successor was not made a party to the suit, a sale will not affect the second mortgage, and the assignee will be permitted to redeem. *Avery v. Ryerson*, 16 B. R. 289.

Where secured creditor has secured his claim without stating fact of its being secured, and has received a dividend thereon, if those interested in the distribution of the estate do not take advantage of the forfeiture of the security caused thereby, third parties, not being so interested, have no standing to do so. *Bassett v. Baird*, 17 B. R. 177.

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Under the law of 1867, it was held that a creditor having a lien upon the bankrupt's estate may decline to appear in the bankruptcy court, in which case he will be unaffected by the proceedings, unless the proper steps are taken to sell the estate clear of all incumbrances; or he may elect to prove his debt in the bankruptcy proceedings, and rely upon his security, and such action will be a waiver of his right to institute any suit or proceeding in any way inconsistent with such election. *Spilman v. Johnson*, 16 B. R. 145.

As to bankrupt and his wife, the bankruptcy proceedings do not divest the State court of jurisdiction of an action to foreclose a mortgage given by them, and the creditor whose claim is secured by a mortgage may, after having proved his claim, and upon leave of the court, foreclose in State court, if the assignee does not object. *McHenry v. La Société Française*, 16 B. R. 385.

A firm creditor holding mortgage security upon the separate estate of one of the partners may prove his whole debt against the joint estate, without valuation or surrender of the security, even though the individual schedules of the partner whose separate estate is thus mortgaged do not show that he holds individual debts. *In re Thomas & Silyer*, 17 B. R. 54.

Where a suit against a bankrupt to enforce a lien is pending at time of the adjudication, the lien creditor may, before any final disposition of such suit, prove his demand in the bankruptcy court, and have it allowed as a lien claim, with all the rights and privileges belonging to it under the bankruptcy law. *Bucknam v. Dunn et al.*, 16 B. R. 470.

A creditor of the bankrupt, holding security by way of mortgage upon real estate, obtained leave of the bankruptcy court to foreclose his mortgage in a State court, sold the real estate under decree of foreclosure, and proved his judgment for deficiency on the sale as a claim against the estate. On re-examination of the claim; Held, that he could not prove for his deficiency; that if he desired to do so he should have taken proper steps to obtain a valuation of his security in the manner prescribed by the law. *In re Herriek*, 17 B. R. 335.

Ordinary order granting leave to foreclose a mortgage upon bankrupt's property can not be construed as directing that the value of the security be ascertained by sale under decree of foreclosure. The fact that a recovery of amount of a mortgage in the bankruptcy court would be burdened with greater expenses than if the mortgagee were allowed to go on and foreclose, will not control the actions of court where it is obviously for the interest of creditors that the estate should be administered in the bankruptcy court. *In re Duryea*, 17 B. R. 495.

The Bowers Savings Bank held a first mortgage on property of the bankrupt, which was not contested by the assignee. It commenced foreclosure proceedings, which were restrained by injunction of the bankruptcy court. On motion to be allowed to proceed with the foreclosure to the entry of judgment; Held, that there was no reason for allowing it to do so, as its rights would be fully secured on the distribution of the proceeds of sale whenever the property should be sold under direction of the court. *Ibid.*

Where a secured creditor proved his debt, had his security appraised and accepted dividend upon balance of his claim, after deducting appraised value of the security, the discharge of the bankrupt is no defense to an action on the security. *Streeper v. McKee*, 17 B. R. 419.

Where creditor whose claim is secured by mortgage has proved such claim in bankruptcy proceedings, and the court has made an order, upon application of a prior lienor, permitting the latter to sell the premises, and directing that the proceeds thereof, beyond the sum admitted to be due on such prior lien, abide the further order of the court upon hearing between claimants of the fund, a State court has no jurisdiction after such sale of a suit to foreclose the mortgage. *Levy v. Haake*, 18 B. R. 544.

ACT OF 1867, § 5075. When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property; subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

Statute revised — March 2, 1867, ch. 176, § 20, 14 Stat. 526. Prior Statutes — April 4, 1800, ch. 19, § 63, 2 Stat. 36; Aug. 19, 1841, ch. 9, § 2, 5 Stat. 442.

**Construction.**— The general purpose and policy of the act is to produce equality among the creditors of insolvent debtors with the exceptions provided for in the act, and to attain that end its provisions should in cases of extreme doubt be construed beneficially for the general unsecured creditors. In *re Jaycox & Green*, 8 B. R. 241.

The term "lien" comprehends all privileges and charges upon the thing recognized by local statutes or long-established usages or the principles of general law. In *re W. C. H. Waddell*, 1 N. Y. Leg. Obs. 53.

A lien denotes a legal claim or charge on property, whether real or personal, for the payment of any debt or duty. *Downer v. Brackett*, 21 Vt. 599; *s. c.* 5 Law Rep. 392; *Storm v. Waddell*, 2 Sandf. Ch. 494.

In the different States there are various securities upon property, which, by the laws of the respective States, are as essentially a lien on the property as those existing at the common law. These liens or securities, peculiar to the several States, are preserved as well as common-law liens. It is of no importance what they are called, whether liens or securities or anything else. *Haughton v. Eustis*, 5 Law Rep. 505; *Downer v. Brackett*, 21 Vt. 509; s. c. 5 Law Rep. 392.

When a party is compelled to pay the debt of a third person in order to protect his own rights, a court of equity substitutes him in the place of the creditor as a matter of course, without any agreement to that effect. *Whithed v. Pillsbury*, 13 B. R. 241.

The term "has" is of broader signification than the term holds. Although the holder of a promissory note, the indorser of which is secured by a mortgage upon the property of the bankrupt, has no legal title or common-law right to any mortgage, pledge or lien upon the property of the bankrupt, which can be directly enforced by him under the strict and technical rules of the common law, yet he has in equity and potentially a mortgage, pledge or lien, upon the property of the bankrupt for securing the payment of his debt within the intent and meaning of this provision. *In re Jaycox & Green*, 8 B. R. 241.

A mortgage to indemnify a surety does not render the principal debt a secured debt. *In re William M. Lloyd*, 15 B. R. 257; s. c. 24 Pitts. L. J. 113.

The provision in regard to the proof of secured claims applies only to securities upon property, real or personal, of the bankrupt. *In re Anderson*, 12 B. R. 502.

A claim that is secured by the guaranty indorsement or collateral liability of a third person may be proved as unsecured. *In re Anderson*, 12 B. R. 502; *in re Hugo Broich*, 15 B. R. 11; *in re William M. Lloyd*, 15 B. R. 257; s. c. 24 Pitts. L. J. 113.

Every line of this section points most distinctly and directly to property of the bankrupt, and only to property of the bankrupt which the district court in bankruptcy can deal with, and does not contemplate the sale of property of third parties held by the claimant as security for his demand. A distinction is taken between the case of a security given to the creditor by the bankrupt himself of his own property, and the case of the security of a third person transferred to the creditor by the bankrupt or otherwise. In the former case the creditor is not allowed to prove his debt against the bankrupt, unless he surrenders up the security, or it is sold with his consent. In the latter case he may prove his debt in bankruptcy without surrendering the security of the third person which he holds, and may, notwithstanding such proof, proceed to enforce his security against such third person, provided, however, that he does not take under the bankruptcy and the security more than the full amount of his debt. *In re Cram*, 1 B. R. 504; s. c. 1 L. T. B. 65; *in re Dunkerson & Co.*, 12 B. R. 413; s. c. 4 Biss. 253; *in re Samuel H. Babcock*, 3 Story, 393.

When one partner pledges his property as security for a firm debt, the creditor may prove his full claim against the firm without a valuation of the securities. *In re Dow et al.*, 14 B. R. 307.

The holder of a bill of exchange which the bankrupt accepted for the accommodation of the drawer has the right to prove his debt, and also to proceed against the drawer by attachment until he has recovered the full amount of his debt. The most that the assignee is entitled to is to have the aid of the court in having the attachment suit carried on to its proper conclusion for the benefit of the bankrupt's estate, as far as regards any surplus which may remain after the creditor has received from the dividends in bankruptcy and under the attachment, the full amount of his debt. The creditor is not bound to pursue the attachment suit at his own expense, unless he chooses so to do, but he is bound, if he does not choose to carry it on upon his own account, to allow the assignee to carry it on for the benefit of the bankrupt's estate at the expense thereof. *In re Samuel H. Babcock*, 8 Story, 398.

**What Liens are Preserved.**— All vested legal or equitable rights and interests in property created by the laws of the State are left undisturbed. But this still leaves open the question whether a particular claim is a right or interest in property. If it is not, it is not a lien or security. *In re Stuyvesant Bank*, 9 B. R. 318; *s. c.* 10 B. R. 399; *s. c.* 49 How. Pr. 133; *s. c.* 12 Blatch. 179.

There is no distinction in the bankruptcy law between different kinds of liens. Its provisions apply equally to all liens, of whatever kind, character, or description. *Davis, Assignee of Bittel et al.*, 2 B. R. 392; *Peck v. Jenness*, 7 How. 612.

The bankruptcy act does not divest liens acquired and consummated before the adjudication of bankruptcy. When it speaks of the estate of the bankrupt, it means such estate with all the incumbrances existing upon it at the time of the bankruptcy; in other words, the net value of the property after the liens upon it are satisfied. *In re Hambright*, 2 B. R. 498; *s. c.* 2 L. T. B. 61; *s. c.* 1 C. L. N. 201.

All the rights, and all the duties of the bankrupt in respect to whatever property, not expressly excluded from the operation of the act, he may hold under whatever title, whether legal or equitable, and however incumbered, pass to and devolve upon the assignee at the date of the filing of the petition in bankruptcy. And all rights thus acquired are to be enforced by process, and all duties thus imposed are to be performed under the superintendence of the national courts. No lien can be acquired or enforced by any proceeding in a State court commenced after the petition is filed. *In re Wynne*, 4 B. R. 23; *s. c.* Chase, 227; *s. c.* 2 L. T. B. 116.

The wife's right of dower is preserved, and will prevail against her husband's assignee. *In re Angler*, 4 B. R. 619; *s. c.* 10 A. L. Reg. 190; *s. c.* 1 L. T. B. 48; *in re Bairlie*, 4 B. R. (quarto) 103, 127; *in re Hester*, 5 B. R. 285. *Contra*, *Hill v. Bowers*, 4 Helsk. 272; *Bostick v. Jordan*, 7 Tenn. 370.

A bankrupt's wife has no inchoate dower in real estate, held as partnership assets. *Hiscock v. Green*, 12 B. R. 507.

If the real estate of the bankrupt is covered by a mortgage, the inchoate dower of his wife attaches to the equity of redemption only. *Ibid.*

The money paid to extinguish the dower of the bankrupt's wife will be apportioned to the parties interested according to the amount of the proceeds which each is entitled to receive. *In re Geo. A. Bartenbach*, 11 B. R. 61; s. c. 2 A. L. T. (N. S.) 33.

If the lien expires by the statute of limitations after the commencement of the proceedings in bankruptcy, the title of the assignee becomes absolute. *Bruner v. Sherley*, 27 Miss. 407.

If a man is seized during coverture of an equity of redemption, and the land is sold under the mortgage, his wife is not entitled, as against his assignee, to a dower interest in the surplus that remains after paying off the mortgage debt. At any time before sale, she can bring her bill to redeem and protect herself against an unreasonable refusal on the part of her husband's assignee to pay the mortgage, especially when such refusal is given with the intent to defeat her interest by suffering a sale to be made. But after a foreclosure and a conversion of the estate into money, it is too late for an application on her part to share in the proceeds. She is as much barred of her right as if foreclosure had been without sale by entry for breach of condition and lapse of time. When the husband's estate in the land is converted into personalty by a sale under the mortgage, it belongs to those who are entitled to his personal estate. *Newhall v. Savings Bank*, 101 Mass. 428.

A creditor, by filing a bill in chancery to reach the equitable or other assets of the debtor, obtains a lien thereon from the time of the service of the process. *Clarke v. Rist*, 3 McLean, 494; *Fetter v. Cirode*, 4 B. Mon. 482; *Storm v. Waddell*, 2 Sandf. Ch. 494; *in re Abner H. Allen*, 1 N. Y. Leg. Obs. 115; s. c. 5 Law Rep. 362; *Watkins v. Pinkney*, 3 Edw. Ch. 533; *Smith v. —*, 4 Edw. Ch. 653. Contra, *in re W. H. C. Waddell*, 1 N. Y. Leg. Obs. 53.

The mere filing of the bill without service of process does not create a lien. *In re Charles Smith*, 1 Penn. L. J. 149.

The lien acquired by filing a creditor's bill extends only to property which can not be reached on execution. *Johnson v. Rogers*, 15 B. R. 1; s. c. 14 A. L. J. 427.

Until a receiver is appointed in the creditor's action, there is no lien against chattels that are subject to levy and sale on execution that can be upheld as against the assignee. *Ibid.*

If a creditor, after the commencement of proceedings in bankruptcy, takes out an insurance policy on the life of the bankrupt as security for the debt, and the bankrupt dies before any dividend is made, he must credit the net amount so realized on his claim, and can only receive a dividend on the balance. *In re Frank Newland*, 9 B. R. 62; s. c. 7 Ben. 63.

If the creditor, after the value of the policy held by him as security has been fixed and credited on his debt, keeps the policy alive, he must, in case the bankrupt dies before a dividend, credit the net amount so realized upon his claim, and only receive a dividend for the balance. He holds the same relation to the estate, as if he had taken out a new policy. *Ibid.*

Each partner has a specific lien upon the partnership property for the satisfaction of the partnership debt, and for the payment of any surplus



that may remain to him after the adjustment of the rights and equities between themselves; and a suit instituted in a State court of equity to enforce such lien wherein a receiver has been appointed, is not terminated or discontinued by the partnership being adjudged bankrupt under proceedings subsequently commenced, but the suit may be continued, and the property distributed in the State court. *Clark v. Binninger*, 3 B. R. 518; s. c. 38 How. Pr. 341; s. c. 3 L. T. B. 49.

The assignment to the assignee is for the benefit of the creditors, and is not affected by secret unrecorded liens. *Brock v. Terrell*, 2 B. R. 643.

If the by-laws of a bank provide that no transfer of stocks shall be made so long as the holder is indebted to the bank, the bank has a lien on the stock for the indebtedness of the holder, and this lien is not waived by taking a note with an indorser. *In re Thomas Morrison*, 10 B. R. 105; s. c. 6 C. L. N. 110.

A national bank has no lien on its stock for debts due to it by the holder of the stock. *Second Nat'l. Bank v. Nat'l. State Bank*, 11 B. R. 49; s. c. 10 Bush, 387. Contra, *in re Robert Dunkerson & Co.*, 4 Biss. 227; *in re Bigelow et al.*, 1 B. R. 667; s. c. 2 Ben. 469.

A banking corporation has a general lien on collaterals deposited to secure a particular debt, and may retain them as security for other debts. *In re Lemuel Peebles*, 13 B. R. 149.

The taking of collaterals expressly as security for a particular debt does not waive the lien which a banking corporation by its charter has reserved on the shares of a stockholder for other debts. *Ibid.*

A broker who holds stocks on a margin is bound to take notice of the bankruptcy of the buyer, and if he continues to hold them for an unreasonable period after that time and then sells them without notice, he must sustain the loss. *In re John H. Daniels*, 13 B. R. 46; s. c. 6 Biss. 405.

A tenant of leasehold premises owned by the bankrupt can not interfere between the owner of the reversion and the assignee, and ask that the rents derived from the tenements shall be appropriated to the extinguishment of the ground rent until he is personally charged with it. *In re Mark Banks*, 1 N. Y. Leg. Obs. 250; s. c. 5 Law Rep. 371.

If a receiver was authorized to issue certificates and make them a lien on the property for the purpose of preserving it, the assignee can not object to the validity of the lien. *Jerome v. McCarter*, 15 B. R. 546.

If the lien depends upon possession, the creditor will be deemed to have waived and abandoned it by a voluntary surrender of the property to the assignee. *In re J. C. Mitchell*, 8 B. R. 47; s. c. 5 C. L. N. 271.

In West Virginia, the State has a prior lien for taxes on all realty. If the lien, however, is for a debt other than taxes, the State is not entitled to any preference over other creditors of the same class. *In re Brand*, 3 B. R. 324; s. c. 2 L. T. B. 66.

The State of New York has a lien upon the machinery and tools of a contractor which are used by him on the prison premises for operating a contract for the services of convicts. *In re Edward Burt et al.*, 13 B. R. 187; s. c. 12 Blatch. 252.

If there are several judgments, the priority of the lien on the real estate is determined by the order in which the judgments are obtained, and the priority of the lien on the personal property is determined by the order of the levy of execution. *Johnson v. Rogers*, 15 B. R. 1; s. c. 14 A. L. J. 427.

A mortgage which is recorded before the filing of a mechanic's lien claim, is, under the laws of New York, entitled to priority. *Moran v. Schnugg*, 7 Ben. 399.

The assignee is not entitled to object to any mistake in regard to the order of priority in which liens are to be paid for; he is only interested in the surplus. *Jerome v. McCarter*, 15 B. R. 546.

The power of marshaling assets will not be exercised to the material injury, or prejudice of the creditor holding both funds. *In re Sauthoff & Olson*, 14 B. R. 364; s. c. 8 C. L. N. 370; s. c. 3 Cent. L. J. 544.

A mere delay or postponing of payment is not regarded as a material injury, for the interest of the claim is deemed an adequate compensation to the party for such delay. *Ibid.*

An action to foreclose a mortgage is not a doubtful remedy, and will not unreasonably delay the party or materially injure or prejudice his rights. *Ibid.*

Where a third party has assigned his property to a creditor to secure the debt, he may require the creditor to first exhaust all the property of the bankrupt upon which he has a claim before proceeding against the property so assigned. *Ibid.*

Where a third party has assigned his property to a creditor to secure the debt, the creditor is not required to exhaust such security before he can enforce his remedies against the bankrupt's estate.

If the United States holds collaterals, it may assert its claim against the estate without first exhausting the collaterals. *Lewis v. U. S.*, 13 B. R. 33; s. c. 14 B. R. 64; s. c. 92 U. S. 618.

**Attorney's Lien.**—An attorney's lien on the papers of a bankrupt for professional services is preserved. *In re New York Mail Steamship Co.*, 2 B. R. 74; *in re Orrin Brown*, 5 Law Rep. 324.

There is no lien on any papers for opposing the petition in involuntary bankruptcy. *In re New York Mail Steamship Co.*, 2 B. R. 74.

In adjusting and liquidating such a lien the following points must be ascertained:

1. What suits ought to be proceeded with by the assignee, either in prosecution or defense.

2. What papers in such suits are in the possession of the attorney, which are necessary to the assignee in prosecuting or defending such suits.

3. The amounts due and unpaid to the attorney in respect of professional services rendered by him in and about such suits severally, which are liens on such papers, and which ought to be paid to the attorney on the delivery of such papers to the assignee. *Ibid.*

The statement of the notes on the schedule as part of the bankrupt's estate by the attorney is not a waiver of his lien thereon. *In re Orrin Brown*, 5 Law Rep. 324.

**Pledges.**— In order to constitute a mortgage, the legal title must pass to the creditor. If the transaction is merely a pledge, the creditor will waive his lien by surrendering the possession to the debtor. *In re Harlow*, 10 B. R. 280.

A party who loans money to a party on a note indorsed by him, does not take it as a pledge. *In re George S. Weeks*, 13 B. R. 263.

Where a promissory note is pledged by a debtor to secure a debt, the special property of the pledgee is not lost by a redelivery to the pledgor to enable him to collect the note. Money which he may collect thereon is the specific property of the creditor. *Clark v. Iselin*, 9 B. R. 19; *a. c.* 11 B. R. 337; *s. c.* 21 Wall. 360; *s. c.* 10 Blatch. 204.

If a note is in the possession of a prior pledgee, an actual delivery of the note to a subsequent pledgee is not indispensable to the validity of the pledge. *In re William H. Wiley*, 4 Biss. 171.

A past consideration is a sufficient consideration for a pledge, if there still remains a subsisting liability. *Ibid.*

Commercial paper deposited by the bankrupt as security, is personal property within this clause. If the bankrupt has indorsed such paper, the pledgee can only prove for the amount due, for the bankrupt can not, by giving him a promise for more, enable him to prove beyond the real debt. Against the promisors on the collateral notes, he can prove for the full amount of the notes, but he can receive in dividends from both parties no more than his whole debt. There is no technical difficulty in the way of this mode of dealing with the subject, because the creditor can surrender the principal note to the bankrupt, and make his proof on the indorsement up to the amount of his debt against the bankrupt, and he will then have no security for his debt. *Ex parte Farnsworth*, Lowell, 497.

If, together with an indorser, the note of the bankrupt is secured by a collateral put up by the maker, equity will treat the collateral as for the benefit of the indorser. The holder has two resources, and if he makes the money out of the indorser the latter has an equitable right to the application of the collateral for his benefit, or he may require in equity that the collateral shall be first applied. *In re Thomas Morrison*, 10 B. R. 105; *s. c.* 6 C. L. N. 110.

A party with whom a sum of money has been deposited to indemnify him as security in an appeal from a judgment rendered against the bankrupt which is still pending, may hold the same until his liability is terminated. *In re Buse*, 3 B. R. 215.

If the assignee collects a note that has been pledged, the court may direct that the proceeds shall be applied to extinguish the liability of the pledge. *In re William H. Wiley*, 4 Biss. 171.

A pledgee has a right to use his collaterals either by sale or collection until the full amount of his debt is satisfied. *Jerome v. McCarter*, 15 B. R. 546.

An assignee can not object that a pledgee was allowed to prove for the full amount of a bond issued by the bankrupt and delivered to him as a collateral. *Ibid.*

An irrevocable power of attorney to transfer stock as a security for a debt is not revoked by the death of the attorney, and the creditor is entitled to the security as against the assignee of the debtor. *Lightner v. Nat'l Bank*, 15 B. R. 69; s. c. 82 Penn. 301.

**Vendor's Lien.**—The vendor's lien for unpaid purchase money will prevail against the assignee under the bankruptcy law. The lien is not extinguished by taking notes, nor by obtaining judgment upon the notes. *In re Perdue*, 2 B. R. 183; s. c. 2 W. J. 279.

The vendor's lien is personal, and not assignable. It does not pass to the transferee of a note given for the purchase money. *In re S. W. Brooks*, 2 B. R. 466.

A vendor's lien is not waived by taking a mortgage on the land therefor, and takes precedence over a judgment lien obtained prior to the mortgage. *In re Bryan*, 3 B. R. 110.

A vendor's lien is not waived or in any manner affected by taking a mortgage upon the property therefor. *In re Hutto*, 4 B. R. 787; s. c. 1 L. T. B. 226; s. c. 3 L. T. B. 197.

A vendor has no lien on the rents for the unpaid purchase money. *Hall v. Scovel*, 10 B. R. 295.

If the vendor of land sold to the bankrupt, collects the rents, he is entitled to credit them on the unpaid purchase money. *Ibid.*

The right to the rents of land vests in the assignee from the time of the commencement of the proceedings in bankruptcy, and an agreement that the vendor may collect them, and apply them to the unpaid purchase money is thereby terminated. *Ibid.*

If the vendor of land still holds the title, his claim for the purchase money is secured. *In re William M. Lloyd*, 15 B. R. 257; s. c. 24 Pitts. L. J. 113.

**Mechanics' Liens.**—The laws of Massachusetts, Oregon, New Jersey, Pennsylvania, Nevada, and Wisconsin create a lien as soon as the labor is performed, or the material furnished and used, but declare that it shall be dissolved unless the creditor shall file a lien claim within a prescribed period. Such lien claim may be filed after the commencement of proceedings in bankruptcy. These steps are necessary to keep the lien alive, and can not be deemed encroachments upon the authority of the bankruptcy court. No sale can be made during the pendency of the proceedings in bankruptcy. The State court will order the suit to stand continued to await the result of the action in the bankruptcy court. *Clifton v. Foster*, 3 B. R. 656; s. c. 103 Mass. 233; *in re Coulter*, 5 B. R. 64; s. c. 2 Saw. 42; s. c. 1 L. T. B. 257; *in re Cook & Gleason*, 3 Biss. 122; *in re Dey*, 3 B. R. 305; s. c. 3 Ben. 450; s. c. 9 Blatch. 285; *Keller v. Denmead*, 68 Penn. 449; *in re Hope Mining Co.*, 1 Saw. 710. Vide *in re Philo R. Sabin*, 12 B. R. 142.

A mechanic's lien which derives its existence wholly from a State statute, and the continuance of which is by such statute made dependent on the commencement of a suit within a prescribed period, is not preserved as a valid incumbrance on the property when no suit is commenced in the State court, and no step taken in the bankruptcy court equivalent to such suit, within the time limited by the statute for the

preservation and enforcement of the lien, although proceedings in bankruptcy are commenced within that period. *In re William Brunquest*, 14 B. R. 259.

To preserve a statutory lien, dependent for its continued existence upon the observance of the terms of the statute, those terms must be complied with by performance of the required act or its equivalent. *Ibid.*

A lien claimant can, as an equivalent for commencing a suit in a State court, prove or assert his lien in the bankruptcy proceedings within the time limited by the statute creating the lien. *Ibid.*

When the material is not in fact used by the bankrupt in the building, the creditor must show that he sold it to be so used. *In re Cook & Gleason*, 3 Biss. 122.

The amount required to finish a contract should be deducted from the stipulated price. *Ibid.*

No claim can be allowed for work done after the filing of the petition in bankruptcy. *Ibid.*

The liens of mechanics and others for work and material relate back to the commencement of the building, without reference to the time when the work is done or material furnished, and have a priority over all liens created by the party after that time. Hence they prevail over a mortgage executed after the commencement of the building. *In re Hoyt*, 3 Biss. 436.

There is no preference as between the claimants of mechanics' liens. The circumstance of one commencing work first does not give any priority. They all stand on the same footing, and are to be paid in full or pro rata as the funds may suffice. *Ibid.*

Hauling quartz to be crushed in a mill is performing labor in carrying on the mill. *In re Hope Mining Co.*, 1 Saw. 710.

No allowance out of the bankrupt's estate can be made to the counsel for a lien creditor who has successfully resisted an attempt on the part of the assignee to vacate the lien. *In re Hope Mining Co.*, 7 B. R. 598.

Where a legislature in one act consolidates all the old laws on the subject of mechanics' liens and repeals the former laws, the new act is to be considered as substituted for and continuing in force the provisions of the old laws rather than as abrogating and annulling them. *In re Hope Mining Co.*, 1 Saw. 710.

An act which repeals a lien law, and thereby takes away the lien for labor already performed, is unconstitutional and void so far as it impairs the obligation of the contract. *Ibid.*

The proceeds arising from the sale of a vessel are subject to the following liens, in the following order, to-wit:

1st. Strictly maritime liens, such as seamen's wages, materials, supplies and repairs in ports of other States, for damages for collision, and for tonnage and wharfage in foreign ports.

2d. Mortgage liens under mortgages made and recorded according to the requirements of section 4192. *In re Dwight Scott*, 3 B. R. 742; s. c. 1 Abb. C. C. 136.

A maritime lien is not divested by the proceedings in bankruptcy. *The Ironsides*, 4 Biss. 518.

Liens created by State laws upon vessels are void. *In re Scott*, 15 I. R. R. 59; *in re Edith*, 6 B. R. 449; s. c. 5 Ben. 432.

Materialmen have a lien upon domestic vessels for repairs made in the home port. *In re Kirkland, Chase & Co.*, 12 A. L. Reg. 300.

If the repairs are made on the credit of the respective vessels, and charged on the books to the vessels, the lien is not waived by merely making out a general account against the owner. *Ibid.*

The new rule in admiralty applies to all libels in rem by materialmen filed after the passage of the rule, whether the repairs were made before or after its passage. *In re Kirkland, Chase & Co.*, 12 A. L. Reg. 300.

**Judgments.**—The lien of a judgment is preserved. *Livingston v. Livingston*, 2 Caines, 300; *Haworth v. Travis*, 13 B. R. 145; s. c. 67 Ill. 301; *Loudon v. Blanford*, 56 Ga. 150.

The bankruptcy act does not discourage diligence in the collection of debts. Creditors who have obtained a lien, by a legitimate effort to collect an honest debt, must be permitted to enjoy the advantages gained by their diligence. *In re Kerr*, 2 B. R. 388; s. c. 2 L. T. B. 39; *in re Campbell*, 1 B. R. 165; s. c. 1 Abb. C. C. 185; s. c. 1 L. T. B. 30; s. c. 6 Phila. 445; *in re Schnepf*, 1 B. R. 190; s. c. 2 Ben. 72.

Where the judgment is not a lien by the State laws, it will not be treated as a lien by the bankruptcy court. *In re McIntosh*, 2 B. R. 506; *in re Cozart*, 3 B. R. 508.

The filing of a transcript of a judgment on Christmas is a mere ministerial act, and will give a valid lien. *In re R. C. Worthington*, 14 B. R. 388; s. c. 3 Cent. L. J. 526; s. c. 8 C. L. N. 302; s. c. 9 C. L. N. 346.

An indorser who pays the judgment against him may take an assignment of the judgment against the maker of the note, and claim the lien thereby secured. *Clason v. Morris*, 10 Johns. 524.

Where a judgment has been obtained in a State court by fraudulent conduct on the part of the plaintiff, its validity can not be contested in the bankruptcy court. Assignees and creditors must resort to the State court in which the judgment was rendered to test its validity. *In re Burns*, 1 B. R. 174; s. c. 7 A. L. Reg. 105; s. c. 6 Phila. 448; *in re Campbell*, 1 B. R. 165; s. c. 1 Abb. C. C. 185; s. c. 1 L. T. B. 30; s. c. 6 Phila. 445.

The objection that there is usury in the consideration of the debt upon which the judgment is founded, can not be raised in the bankruptcy court. The district court can not go behind the judgment of a State court and inquire into the consideration of the debt upon which the judgment is founded. If any matter of fact constitutes the ground for a review, a writ of error coram nobis in the court wherein the judgment was rendered would be the proper mode of redress. A court of equity is not the proper forum. *McKinsey v. Harding*, 4 B. R. 39.

A judgment can not become usurious by means of a stipulation that the accruing interest shall bear interest if not paid annually. The State laws provide the rate of interest a judgment shall bear, and the parties can not change it by stipulations or terms inserted therein. Such stipulations are simply void. The payment of a judgment confessed for a sum due may be enforced by execution; but if the creditor neglects or forbears to use

this remedy, he can not recover interest on interest accruing in the meantime. The fact that such a stipulation was never attempted to be enforced is a good defense to the charge of usury. In *re Price Fuller*, 4 B. R. 115; s. c. 1 Saw. 243.

The statutory right of a judgment creditor to redeem the lands of his debtor, sold under judicial process, is not taken away by the bankruptcy of the debtor occurring after the rendition of judgment and before the offer to redeem. *Trimble v. Williamson*, 14 B. R. 53; s. c. 49 Ala. 525.

Under the laws of New York, a judgment confessed to secure future advances of notes and other commercial paper is valid. *Cook v. Whipple*, 9 B. R. 155; s. c. 55 N. Y. 150.

In New York, the filing and docketing of a transcript of a judgment in the office of the county clerk makes the judgment a lien on all the real estate of the defendant situated in the county. In *re J. P. & J. Smith*, 1 B. R. 569; s. c. 2 Ben. 122; s. c. 2 Ben. 432; s. c. 1 L. T. B. 112.

In New York, a judgment rendered against four persons as joint debtors in an action, in which one of them was not served with process, and in which he did not appear, is not a legal lien upon the individual property of the person who was not served with a process. Nor is it entitled to payment out of real estate purchased in his name prior to the creation of the debt on which such judgment is founded, although one-half of the purchase money was furnished by one of the other joint debtors whom it binds. Nor will the fact that these two were partners give it any claim to payment therefrom, on the ground that the one who was served with process had an equitable interest therein. Such an equitable interest is not bound by a judgment and execution against the owner. Nor will the fact that the four joint debtors were partners make it a lien upon such property. The judgment is not even evidence of indebtedness as against the party not served, and a fortiori is no lien in equity any more than at law upon his separate property. No lien is obtained upon equitable interests or choses in action by judgment and execution alone. In order to obtain a lien, the creditor must have his execution returned unsatisfied, and file a bill in equity, or take other legal proceedings to reach such choses in action or equitable interests. In *re Hinds et al.*, 3 B. R. 351.

In Texas, from Feb. 14, 1860, to Nov. 9, 1866, a judgment in a court of record created no lien on real estate, unless the same was recorded in the clerk's office of the county court in the county where the land was situated. A deed made before, but recorded after the rendition of a judgment, passes a legal title, and prevents the judgment from becoming a lien on the lands so conveyed. In *re C. Dean*, 3 B. R. 769.

In Georgia, a judgment is not a lien upon a promissory note, nor entitled to priority of payment out of the proceeds thereof. The State laws relating to the distribution of the estate of a decedent, and of money brought into a State court, do not govern the distribution of the estate of a bankrupt. The bankrupt's assets must be divided in accordance with the provisions of the bankruptcy act. In *re Erwin & Hardy*, 3 B. R. 580.

In Georgia, a judgment becomes dormant when there has been no entry upon the execution for seven consecutive years, although the stay laws

were in force and the rebellion existed during a portion of that time. *In re Cozart*, 3 B. R. 508.

In Ohio, the sheriff may make a levy on land by getting a description of the land from the recorder's office, and indorsing a description of the land and the fact of the levy on the back of the execution, without going near the land, and such a levy becomes a valid lien on the land. *Armstrong v. Rickey Brothers*, 2 B. R. 473; s. c. 1 C. L. N. 145.

In North Carolina, a judgment prior to the enactment of the Code of Civil Procedure was not a lien on the property, either real or personal, of the defendant until a levy was actually made. Without the levy there was no lien. *In re McIntosh*, 2 B. R. 506; *in re Mebane*, 3 B. R. 347.

In Missouri, a judgment is not a lien upon personal property until there has been an actual seizure thereof. *In re Kerr*, 2 B. R. 388; s. c. 2 L. T. B. 39.

In Mississippi, the enrollment of a judgment makes the judgment a lien upon all the estate, real and personal, of the defendant situated in the county where the enrollment is made. *Pennington v. Sale & Phelan et al.*, 1 B. R. 572; *Jones v. Leach et al.*, 1 B. R. 595.

The question of the validity of a lien can not be decided on ex parte affidavits. *In re Hafer & Bro. (in re Beck)*, 1 B. R. 586; s. c. 6 Phila. 474.

If an assignment is fraudulent, a creditor may obtain a lien upon the real estate by getting a judgment, and upon the personal property by the levy of an execution thereon, and such lien, if obtained before the commencement of the proceedings in bankruptcy, is valid as against the assignee. *Johnson v. Rogers*, 15 B. R. 1; s. c. 14 A. L. J. 427.

A creditor who is precluded from assailing an assignment as fraudulent can not obtain a lien on the property which will be valid as against the assignee. *Ibid.*

A creditor who, with full knowledge of the facts that constitute the fraud, concurs with other creditors in assenting to its execution, can not impeach it as fraudulent. *Ibid.*

A party who takes a colorable transfer of a claim from a trustee who has accepted the trust with full knowledge of all the facts, can not impeach the assignment. *Ibid.*

A creditor who has assented to an assignment may purchase a claim from a creditor who has not done so, and as to that claim, may impeach the assignment. *Ibid.*

A creditor who purchases property from the trustee in ignorance of the fraud is not precluded from impeaching the assignment. *Ibid.*

A party who purchases a judgment has no higher right to impeach a fraudulent assignment than his assignor had. *Johnson v. Rogers*, 15 B. R. 1.

A judgment against a partner individually is a lien on real estate held by the firm, subject, however, to the payment of the firm debts and the equities of the other partner. *Johnson v. Rogers*, 15 B. R. 1; s. c. 14 A. L. J. 427.

A judgment rendered after the commencement of the proceedings in bankruptcy, is not entitled to a lien on a fund in a State court. *Loudon v. Blanford*, 56 Ga. 150.



**Executions.**—A levy that is good, and creates a valid lien under the State laws, will be held valid in the bankruptcy court. *McLean v. Rocky*, 3 *McLean*, 235; in *re Dudley*, 1 *Penn. L. J.* 302; in *re Winn*, 1 *B. R.* 496; s. c. 1 *L. T. B.* 17; *Armstrong v. Rickey Brothers*, 2 *B. R.* 473; s. c. 1 *C. L. N.* 145.

The lien of a levy is not affected by the fact that the execution creditor held further securities for the judgment. In *re Peter Hufnagel*, 12 *B. R.* 554.

The lien of a levy made under an execution issued upon a final judgment, obtained bona fide and without collusion, provided such lien attached before the commencement of proceedings in bankruptcy, is preserved. In *re Bernstein*, 1 *B. R.* 199; s. c. 2 *Ben.* 44; in *re J. P. & J. Smith*, 1 *B. R.* 599; s. c. 1 *L. T. B.* 112; s. c. 2 *Ben.* 122; s. c. 2 *Ben.* 432; in *re Kerr*, 2 *B. R.* 388; s. c. 2 *L. T. B.* 39; in *re Campbell*, 1 *B. R.* 165; s. c. 1 *Abb. O. O.* 185; s. c. 1 *L. T. B.* 30; s. c. 6 *Phila.* 445; in *re Schnepf*, 1 *B. R.* 190; s. c. 2 *Ben.* 72.

Where a creditor obtains a judgment, and holds or uses it for the purpose of preventing or obstructing other creditors in the collection of their claims, courts will see that no undue advantage is taken. In *re Kerr*, 2 *B. R.* 388; s. c. 2 *L. T. B.* 39; s. c. 6 *Phila.* 445.

In the absence of fraud, or preference in obtaining a judgment and execution, mere delay in making a levy will not defeat the lien which the law gives against the goods of a defendant in execution from the time the writ comes into the hands of the sheriff. In *re Chas. R. Weeks*, 4 *B. R.* 364; s. c. 2 *Biss.* 259.

The sheriff has no lien upon goods under the levy of an execution issued upon a judgment obtained in violation of the bankruptcy law, and thus rendered void. In *re David Kempner*, 43 *How. Pr.* 129.

When a constable levies on property in the hands of a sheriff by virtue of a judgment subsequently declared to be invalid, as a fraud upon the bankruptcy act, but suspends further proceedings, the lien thus acquired will be preserved, even though the period fixed by law for the lifetime of an execution does elapse before he can enforce it. *Haughey v. Albin*, 2 *B. R.* 399; s. c. 2 *Bond*, 244; s. c. 2 *L. T. B.* 47.

The mere delivery of an execution to the sheriff does not give to the judgment creditor a lien which will prevail over the title acquired by the assignee to the personal effects of the defendant in the execution. In *re Elam Rust*, 1 *N. Y. Leg. Obs.* 326.

If a judgment creditor had levied an execution on the property before the commencement of the proceedings in bankruptcy, he is entitled to payment out of the proceeds, although an appeal was taken from the judgment without filing a bond to stay execution. In *re Gold Mountain Mining Co.*, 15 *B. R.* 545; s. c. 3 *Saw.* 601.

Where writs are in the hands of different officers, they take priority according to the time of the levy, and not according to the time of the issue. In *re Hughes & Son*, 11 *B. R.* 452; s. c. 7 *O. L. N.* 162.

As between different writs issued from different courts, the one first actually executed binds the property, without regard to the priority of lien

created by the delivery of the writ to the officer. The warrant issued in a case of involuntary bankruptcy is such a writ or legal process as will divest the lien of a prior execution which has never been levied. In re Tills & May, 11 B. R. 214.

The receipt of a second execution after the levy under the first, and while such levy remains in force, operates as a constructive levy under the second, and an actual levy is unnecessary. In re J. P. & J. Smith, 1 B. R. 590; s. c. 2 Ben. 122; s. c. 2 Ben. 432; s. c. 1 L. T. B. 112.

A general description of the property is sufficient when the legal import of the return is that the sheriff took possession. The lien of a levy is not lost by taking a delivery bond. The execution creditors are entitled to a lien upon the property levied upon by the sheriff, although it is afterward seized by the marshal. Swope v. Arnold, 5 B. R. 148.

A levy does not create a valid lien unless the sheriff designates the property seized under the execution either in the body of the return or by reference to a schedule accompanying it. Barnes v. Billington, 1 Wash. C. C. 29; s. c. 4 Day, 81, note.

Where a levy is made prior to the commencement of the proceedings in bankruptcy, the lien thereof is not lost under the laws of Missouri, although the sheriff does not sell during the term, but returns the writ, for the property may be sold under a new execution. Webster v. Woolbridge, 3 Dillon, 74.

The lien of a levy is preserved, although the property is left in the debtor's store under the charge of his employee, who gives the sheriff a receipt therefor. In re Peter Hufnagel, 12 B. R. 554.

A levy does not create a valid lien if the debtor is allowed to remain in possession of the property and exercise acts of ownership over it. Barnes v. Billington, 1 Wash. C. C. 29; s. c. 4 Day, 81, note.

If the levy has been actually made, the execution is a lien on the property, although the custodian appointed by the sheriff is temporarily absent at the time when the marshal takes possession. In re Hughes & Son, 11 B. R. 452; s. c. 7 C. L. N. 162.

The lien of an execution is lost unless the execution is renewed from term to term until the proceedings in bankruptcy are commenced. Stewart v. Hargrove, 23 Ala. 429.

The execution of a forthcoming bond by a third person who claims the goods taken under an execution does not destroy the lien. The lien may be kept in abeyance, but its active energy will be revived, and the lien may be coerced so soon as the claim interposed shall be determined to be indefensible. Doremus v. Walker, 8 Ala. 194.

A judgment creditor does not obtain a specific lien upon the equitable estate of the debtor by the return of an execution unsatisfied, but by the commencement of a suit in equity, after the execution has been so returned. Blake v. Bigelow, 5 Ga. 437; Powell v. Knox, 16 Ala. 364; in re Hinds et al., 3 B. R. 351.

The return of the sheriff is a matter of record, and, therefore, conclusive, and can not be inquired into in the proceedings in bankruptcy. If the return is false, the sheriff is answerable for it to the proper party in a

proper action, but its truth or falsity can not be inquired into in an action between other parties. *Armstrong v. Rickey Brothers*, 2 B. R. 473; s. c. 1 C. L. N. 145.

The return of *nulla bona* does not preclude the execution creditor from showing that there was property of the bankrupt on which the execution was a lien. *In re Tills & May*, 11 B. R. 214.

The plaintiff in a judgment obtained in a Federal court on which an execution was issued, and under which the marshal sold property of the defendant, is entitled to the proceeds of such sales, although that judgment, execution, and levy under it were subsequent to a judgment, execution, and levy of process from a State court. The marshal can only sell such right or interest in property as the process in his hands will warrant, though he may declare that he sells more or a higher interest, or even so states in his conveyance. His conveyance transfers no more or greater interest to the purchaser than the law, by virtue of the process and the proceedings upon which the same is based, allows to pass. If a prior lawful incumbrance or lien exists, the sale can only be and is made subject to such incumbrance or lien. A purchaser at an execution sale is as much bound to know of the existence of a prior lien or incumbrance existing against the property offered by force of a judgment, execution, and levy, as if there were an incumbrance existing by a mortgage, or in any other way. *In re William B. Jordan*, 3 B. R. 182.

The sheriff is entitled to poundage fee on a levy at the time he makes the levy. A sale is not necessary. *In re Black & Secor*, 2 B. R. 171.

Poundage can be allowed only on the amount which the property brought, and is a lien thereon. *In re William Welch*, 5 Ben. 278.

If the sheriff acts in good faith, he is entitled to be paid, without reference to the validity of the judgment. *Ibid.*

The taxation of costs by a State court, without notice either to the bankrupt or the assignee, or any other person, will not be regarded as in any sense a judicial act. *In re David Kempner*, 43 How. Pr. 129.

**Mortgages.**—A note signed by the bankrupt and his wife, and secured by a mortgage upon the wife's real property, may be allowed as a secured demand. The court, on proper motion, will attend to the application of the security and to the interests of the assignee in the realty. *In re J. Hartel*, 7 B. R. 559.

The assignment of a lease by the lessor and the execution of a power of attorney to collect the rent, gives the grantee a lien upon the rent thereby reserved. *Meador v. Everett*, 10 B. R. 421; s. c. 3 Dillon, 214.

Where the mortgage embraces property situated in two States, and is duly recorded in one State, but is not duly recorded in the other, it is valid as to the property situated in the first, but will not bind the property situated in the second. It must be regarded as if the property situated in the State where it was not duly recorded was not embraced in it. *In re Soldiers' Business Messenger and Dispatch Co.*, 2 B. R. 519; s. c. 3 Ben. 204.

When a mortgage contains a stipulation that the mortgagor shall remain in possession and sell the mortgaged property as the agent of the mortgagee, and account for the proceeds thereof until the mortgage debt is

paid, the proceeds of all sales made subsequent to the execution of the mortgage must be credited pro tanto toward the payment of the mortgage debt, and the debt itself will be extinguished as soon as the proceeds of such sales equal the amount of the debt and interest, whether the same have been paid to the mortgagee or not. *Hawkins v. National Bank of Hastings*, 2 B. R. 338; s. c. 1 Dillon, 462; *Smith v. Ely*, 10 B. R. 553.

If the mortgagee never had any such notes as those described in the mortgage, the mortgage is ineffectual. *Jewett v. Preston*, 27 Me. 400.

A mortgage of real property by a corporation must be under the corporate seal or it will be of no effect. *In re St. Helen's Mill Co.*, 10 B. R. 414; s. c. 3 Saw. 88.

A mortgage executed by the officers without due authority from the corporation does not bind the corporation even as an equitable mortgage. *Ibid.*

The distinction between real and personal property, and between the means which are necessary to affect them, is well settled. Personal property, according to the common law, could always be transferred or incumbered without the use of a deed for that purpose. A seal has never been held necessary to the validity of a bill of sale. A chattel mortgage is only a bill of sale with a defeasance incorporated in it. The presence or absence of that formality is wholly immaterial. *Gibson v. Warden*, 14 Wall. 244; *Jenkins v. Mayer*, 3 B. R. 776; s. c. 2 Biss. 303.

If the laws of the State do not require a mortgage of personal property to be under seal, the fact that a seal is attached does not change its character or effect. The seal may be regarded as surplusage. *Gibson v. Warden*, 14 Wall. 244; *Hawkins v. National Bank of Hastings*, 2 B. R. 338; s. c. 1 Dillon, 462.

One partner can bind the firm by an instrument under seal in the name of the firm where all the partners are interested in the transactions, if there is a previous parol authority or a subsequent parol assent to the act. *Ibid.*

It is not necessary that an agent should have written authority to make a bill of sale of personal property. When an agent without authority executes a bill of sale under seal, the ratification need not be by an instrument under seal. *Jenkins v. Mayer*, 3 B. R. 776; s. c. 2 Biss. 303.

A mortgage given to secure future advances to the amount of \$25,000, with a stipulation that the account shall be adjusted at a certain time, under which \$53,000 was advanced, and more than \$25,000 repaid, is not thereby fulfilled and extinguished, but stands as a security for the balance that was due at the stipulated time of settlement, even though a note for the \$25,000 was given at the time of the execution of the mortgage. *In re York & Hoover*, 3 B. R. 661.

Under the laws of Louisiana, notes mentioned in a mortgage as secured thereby, which were placed in the hands of an agent for negotiation, but not negotiated until after the inscription of the mortgage, are protected by the same. The mortgagor's purpose was to raise money by a loan, and, preparatory thereto, the notes were made and a mortgage, declaring the existence of a debt, executed and inscribed, and both mortgage and notes

placed in the hands of an agent for negotiation. It may be that, until they were negotiated, there was no creditor, no debtor, no right of action, and no perfect obligation; but the agent, from the date of inscription, was in the possession of all means to the making of a perfect contract by the delivery of the securities to a bona fide holder. These securities, by such a delivery, become operative from their date, and are binding ab initio. *Ibid.*

Under the laws of New Jersey, a chattel mortgage is good against judgment creditors from the time of filing. *Miller v. Jones*, 15 B. R. 150.

An assignee can not recover the value of property covered by a mortgage if the mortgagee took possession before the commencement of the proceedings in bankruptcy. *Ibid.*

A statement which notifies creditors of the extent of the mortgagee's lien is sufficient to accompany the refiling of a mortgage. *Ibid.*

A mortgage stipulating for the payment, at or before the expiration of nine months from the date thereof, of certain notes therein described, one note only being described, and for the payment of any and all notes given or indorsed by the mortgagee for the accommodation of the mortgagor during the pendency of the mortgage, secures all notes of the kind mentioned until it is given up, or in some way canceled or abrogated. It is not terminated by the payment of the described note and of all notes given or indorsed within nine months after its date. *In re Chas. W. Griffiths*, 3 B. R. 731; s. c. *Lowell*, 431.

A mortgage made in good faith to secure future advances is valid to the extent of the advances actually made. *Marvin v. Chambers*, 13 B. R. 77; s. c. 12 *Blatch*, 495.

Where a mortgage made by a railroad corporation provides that it shall include all property subsequently acquired by the mortgagor, it will include a railroad with its appurtenances subsequently leased by the mortgagor, and the title thereto will be valid as against the assignee of the mortgagor. *Barnard v. N. & W. R. R. Co.*, 14 B. R. 469; s. c. 3 *Cent. L. J.* 608.

A mortgage or other conveyance made as security for a debt evidenced by a note or bond, will operate as security for the same continuing debt, though the evidence of it be changed by renewal or otherwise. But the rule is different when the security itself is changed, and not the evidence of the debt. When a deed is made in substitution of a prior deed, the prior deed ceases to have any validity or effect. *In re Wynne*, 4 B. R. 23; s. c. *Chase*, 227; s. c. 2 *L. T. B.* 116; *in re Jas. Jordan*, 9 B. R. 416; s. c. 7 *Pac. L. R.* 194; *Barron v. Morris*, 14 B. R. 371; s. c. 2 *Woods*, 354.

If the mortgage by mistake describes the note as made by A. and indorsed by B., it may be corrected in equity so as to cover a note made by A. and signed by B. as surety. *In re Clark & Daughtrey*, 10 B. R. 21.

A mortgage of personal property does not cover what is afterward acquired. As to such property, it is in the nature of a revocable license to take possession. Under some circumstances, the term "goods and merchandise," may include fixtures, but the facts of the case may limit the construction of the language. *In re Eldridge*, 4 B. R. 498; s. c. 2 *Biss*, 362.

If a mortgagee takes possession of the vessel mortgaged, and omits to sell it within a reasonable time, this operates as a satisfaction of the debt to the extent of its value when he took possession. *In re Haake*, 7 B. R. 61; s. c. 2 Saw. 231.

If the mortgage contains a stipulation, that the counsel fees and costs to which the mortgagee may be put in collecting the debt shall be paid by the mortgagor, the usual commission for collection may be allowed. *Maus v. McKellip*, 38 Md. 231.

The fee paid to counsel for resisting a suit by the assignee to sell the property free from all liens, can not be allowed. *Ibid.*

If the mortgage contains a stipulation that the mortgagee may retain the possession of the property until the mortgage debt is paid, the assignee can not divest the mortgagee of the possession until the debt secured by the mortgage is paid. *Pindell v. Vimont*, 14 B. Mon. 400.

In order to obtain the profits when the mortgage is not full security for the debt, the mortgagee may enter or bring his writ of entry. If he chooses to lie by and suffer the mortgagor to keep possession, he consents that the intermediate profits may be received by him and held without account. He can only acquire an equitable lien upon the rents or profits by a bill in equity and the appointment of a receiver, before the growing crop is severed, or the rent is collected, and becomes vested in the mortgagor or his legal representatives in possession. The filing of the petition in bankruptcy fixes the rights of the several parties in interest; and the rights, equitable or otherwise, not actually acquired by lien, in virtue of a bill and the appointment of a receiver, remain unacquired or unsecured, as the case may be. When no such lien has been acquired, the assignee is entitled to the proceeds of grass cut by him from the mortgaged premises, and the mortgagee has no prior claim upon the same. *In re M. J. Snedaker*, 4 B. R. 168; s. c. 2 L. T. B. 152; *Ellis v. Bost. & Hart. R. R. Co.*, 107 Mass. 1; *Foster v. Rhodes*, 10 B. R. 523; *in re J. S. K. Bennett*, 12 B. R. 257; *in re Mark Banks*, 1 N. Y. Leg. Obs. 250; s. c. 5 Law Rep. 371.

The mortgagee is entitled to the rents from the time of filing a claim therefor in court, and due notice thereof to the assignee. *In re J. S. K. Bennett*, 12 B. R. 257.

A mortgagee is not entitled to have the rents which fell due after the commencement of the proceedings in bankruptcy, and were collected by the assignee, applied to his mortgage claim, although the mortgage also conveys the rents, issues and profits of the land. *Foster v. Rhodes*, 10 B. R. 523.

If there be doubt whether the mortgaged premises are adequate security for the payment of the debt and interest, the district court will recognize the proper lien of the mortgage upon the land, and the equitable right of the mortgagee to have the rents separated from the general estate of the bankrupt, by a receivership or otherwise, and not permit them to be applied to the payment of other debts, or even to the expenses of the assignee or his fees. *In re Sacchi*, 6 B. R. 497; s. c. 43 How. Pr. 250.

The assignee, upon the application of the mortgagee, may be directed to pay to the mortgagee a reasonable compensation for the use of the

mortgaged premises, as rents and profits. *Hutchings v. Muzzy Iron Works*, 8 B. R. 458; s. c. 6 C. L. N. 27.

If the defendant becomes bankrupt before the service of process on him in a proceeding to foreclose a mortgage, the mortgagee will be entitled to the rents collected by a receiver subsequently appointed therein. *Hayes v. Dickinson*, 15 B. R. 350; s. c. 16 N. Y. Supr. 277.

A covenant to insure for the benefit of the mortgagee runs with the land. If the mortgagor does in fact keep the premises insured by a policy which contains no statement that the mortgagee has any interest therein, the mortgagee, nevertheless, has an equitable interest or lien upon the proceeds of the policy, in case of loss, which will be enforced for his benefit. Although the mortgage stipulates that the insurance shall be made in companies to be selected at the option of the mortgagee, the mortgagee is entitled to the benefit of the insurance that is made, whether it was effected without or even contrary to his selection. *In re Sands' Brewing Co.*, 6 B. R. 101; s. c. 3 Biss. 175.

When changes are made after acknowledgment, the mortgage should be reacknowledged. *Harvey v. Crane*, 5 B. R. 218; s. c. 2 Biss. 496.

Under the laws of Texas, a mortgage executed and recorded after the rendition of a judgment, but before the recording of the same, is entitled to priority over the lien of the judgment. *In re Lacy*, 4 B. R. 62; s. c. 1 L. T. B. 226.

If there are two mortgages upon a vessel, one upon one-half of the vessel, and the other upon three-quarters of the vessel, the first will, if possible, be paid out of the one-fourth not covered by the latter, and the remaining three-fourths will be applied to the latter. This applies to the distribution the familiar principle that where there are two funds, and one of them is subject to the lien of one suitor, and the lien of another suitor covers both, the latter suitor will be paid, if possible, out of the fund that is subject only to his own lien. *In re Edith*, 6 B. R. 449; s. c. 5 Ben. 432.

The bankrupt can not have the inscription of a judgment rendered against him erased, if it has not been paid. The bankruptcy act does not provide that a sale of the property shall operate as a release of the mortgage, and attach it to the proceeds. *State v. Recorder*, 21 La. An. 401.

A mortgage of personal property to be subsequently acquired, constitutes an equitable lien which may be enforced against the assignee, for wherever the parties, by their contract, intend to create a positive lien or charge upon personal property, whether it is then owned by the contractor or not, and whether it is then in esse or not, the lien attaches in equity as soon as the contractor acquires a title thereto. *Mitchell v. Winslow*, 2 Story, 630; *Barnard v. N. & W. R. R. Co.*, 14 B. R. 469; s. c. 3 Cent. L. J. 608; *Brett v. Carter*, 14 B. R. 301.

**Equitable Liens.**—Equitable liens, mortgages, and securities are as much within the act as legal liens, unless there is some prohibition in the State laws which renders them invalid. *Parker v. Muggridge*, 2 Story, 334; *Fletcher v. Morey*, 2 Story, 555; *in re Abner H. Allen*, 1 N. Y. Leg. Obs. 115; s. c. 5 Law Rep. 362.

Possession is not necessary to create or support an equitable lien. *Parker v. Muggridge*, 2 Story, 334.

Every agreement for a lien or charge in rem, whether upon real estate or personal estate, or money in the hands of third persons, constitutes a trust, and may be enforced as an equitable lien. *Fletcher v. Morey*, 2 Story, 555.

It is a universal maxim that, wherever persons agree concerning a particular subject, in a court of equity, as against the party himself and any claiming under him voluntarily or with notice, it raises a trust, and the same rule prevails in bankruptcy. *Parker v. Muggridge*, 2 Story, 334.

If the equitable lien is valid by the laws of the State, it may be allowed, although no remedy is provided for its enforcement by the State jurisprudence in the State courts. *Fletcher v. Morey*, 2 Story, 555.

An agreement that goods to be purchased with future advances are pledged and hypothecated for the repayment thereof, constitutes an equitable lien on the goods. *Ibid.*

**Sale Free From Incumbrances.**—On the application of the assignee, the district court may order incumbered property to be sold free from incumbrances, the lien being transferred to the fund in court. In *re T. R. Stewart*, 1 B. R. 278; s. c. 1 L. T. B. 16; in *re Barrow, re Loeb, Simon & Co., re Winter*, 1 B. R. 481; s. c. 1 L. T. B. 63; in *re McClellan*, 1 B. R. 389; in *re Columbian Metal Works*, 3 B. R. 75; in *re Salmons*, 2 B. R. 56; in *re Alabama & Florida Railway Co.*, 1 B. R. (quarto) 100; *Conrad v. Prieur*, 5 Rob. (La.) 49; *Benjamin v. Prieur*, 8 Rob. (La.) 193; *Ducros v. Fortin*, 8 Rob. (La.) 165; *Foster v. Ames*, 2 B. R. 455; s. c. *Lowell*, 313; in *re Schnepf*, 1 B. R. 190; s. c. 2 Ben. 72; in *re Rhodes*, 19 Pitts. L. J. 99; s. c. 3 Pac. L. R. 99; s. c. 6 W. J. 123; in *re Nat'l. Iron Co.*, 8 B. R. 422; s. c. 20 Pitts. L. J. 208; s. c. 30 Leg. Int. 272; *Sutherland v. Lake Superior Canal Co.*, 9 B. R. 298; s. c. 1 Cent. L. J. 127; *Houston v. City Bank*, 6 How. 486.

The disposition of the securities is a matter resting in the sound discretion of the district court, upon all the circumstances of each particular case. The district court has full authority to ascertain the true value by a sale or by an appraisement, or in any other mode which it may deem best for the interest of all concerned in the estate, or it may allow the creditor to take any one or more or all of the securities at their nominal value, if that is ascertained to be the true and highest value of the security. In *re Benjamin B. Grant*, 5 Law Rep. 303.

The liens, mortgages and other securities within the purview of this provision, so far as they are valid, are not to be annulled, destroyed or impaired under the proceedings in bankruptcy, but they are to be held of equal obligation and validity in the Federal courts as they would be in the State courts. The district court sitting in bankruptcy, is bound to respect and protect them. But this does not, and can not, interfere with the jurisdiction and right of the district court to inquire into and ascertain the validity and extent of such liens, mortgages and other securities. In *re William Christy*, 3 How. 292.

If it be ascertained that the property of a bankrupt is incumbered by lien or mortgage, the assignee may, if he shall believe it to be to the inter-



est of that class of creditors whom he especially represents — for instance, the class entitled to pro rata distribution — file his petition and obtain an order directing him to sell the property incumbered on such terms as to the court may seem proper, and convey the property free from such incumbrance. The court will then protect the lien creditors by a proper distribution of the proceeds. But it is not a part of the duty of the assignee so to petition, unless he shall believe that such a sale will create a larger fund for distribution to creditors generally than if there should be a sale by the lien creditor. *In re Mebane*, 3 B. R. 347; *in re McClellan*, 1 B. R. 389.

Although the mortgage contains a clause *de non alienando*, a purchaser will acquire a valid title, and his assignee may sell the property free from the mortgage. *Ducros v. Fortin*, 5 Rob. (La.) 165.

A secured creditor does not have absolutely the election to stand outside of the operation of the bankruptcy act. The assignee has the right to bring him into the court of bankruptcy, and contest the amount of his debt and the validity of his lien, and to have the court make such equitable orders as to the disposition of the property as seem best. The court of bankruptcy has the right to prevent the control from being taken away by resort to other tribunals against its will. *Markson v. Heaney*, 4 B. R. 510; s. c. 1 Dillon, 497, 511, note; *Bromley v. Smith*, 5 B. R. 152; s. c. 2 Biss. 511; *Clarke v. Rosenda*, 5 Rob. (La.) 27.

The bankruptcy court has the right to take possession of the mortgaged property after a default in payment, and sell it without first satisfying the mortgage, although the mortgagee is in possession. *In re Kahley*, 4 B. R. 378; s. c. 2 Biss. 383.

When the proceedings to foreclose a mortgage in the State court have reached a stage where substantially all the expenses except those which would attend any sale of the property, even by the bankruptcy court, have been incurred, and incurred by the action of the assignee while a party to such suit in suffering proceedings to go on without applying to the bankruptcy court to restrain them, the petition for leave to sell the property free from incumbrances will be denied. *In re H. Brinkman*, 6 B. R. 541; s. c. 7 B. R. 421; *Augustine v. McFarland*, 13 B. R. 7.

When an order is made to sell property against which a judgment of foreclosure has been entered, the injunction against the sale under the judgment may be so far modified, if deemed desirable in order to obtain a better price for the property, that the sale may take place under both the order and the judgment, and the referee may unite in the deed. *In re Hanna*, 4 B. R. 411; s. c. 4 Ben. 469.

The power ought not to be exercised where the rights of the secured creditor will be injuriously affected, as where the property has no market value, or one that is clearly less than the mortgage debt. In such a case the secured creditor ought to have the right to hold the property, and wait the chances of a market if the assignee will not redeem. *Foster v. Anea*, 2 B. R. 455; s. c. Lowell, 313; *in re Kahley*, 4 B. R. 378; s. c. 2 Biss. 383; *in re Jacob F. Hahnen*, 1 Penn. L. J. 10.

The petition for leave to sell free from incumbrances must set forth the facts and circumstances which justify the application, so that the court may decide whether or not the application shall be granted. *Ray v. Norseworthy*, 12 B. R. 145; s. c. 25 La. An. 600; s. c. 23 Wall. 128.

The application for a sale must state what persons have liens, incumbrances, and interests in the property, and notice must be given prior to the sale to all persons claiming to have liens, incumbrances or interests therein. *In re Anon.*, 29 Leg. Int. 20.

Proper notice of the application for leave to sell incumbered property should be served on the secured creditor. *Foster v. Ames*, 2 B. R. 455; s. c. Lowell, 313; *Houston v. City Bank*, 6 How. 486; *Fowler v. Hart*, 13 How. 373.

If the mortgagee is not made a party to the proceeding to sell the property free from incumbrances, his rights will be unaffected thereby. *Ray v. Norseworthy*, 12 B. R. 145; s. c. 25 La. An. 600; s. c. 23 Wall. 128; *Meeks v. Whatley*, 10 B. R. 498. *Contra*, *Wilson v. Turpin*, 5 Gill, 56.

The assignee ought not to be permitted to make private sales, or sales on credit, without first submitting the price and terms of the sale to the court on notice to the mortgagee for approval and confirmation. *In re Frederick S. Kirtland*, 10 Blatch. 515.

A sale by the assignee of property free from all incumbrances will not divest the right of the State to enforce the payment of taxes on the property wherever it may be found, and the purchaser takes it subject to that right. *Stokes v. State*, 9 B. R. 191; s. c. 46 Ga. 412; *Meeks v. Whatley*, 4 B. R. 498.

A mortgagee can not demand, as a matter of right, that the assignee shall, upon his offer, convey the premises to him on condition of his agreeing not to present a claim for any part of the debt against the other assets of the bankrupt. Neither the refusal of the assignee to accede to such a proposition, nor the refusal of the court to permit him to accept, will be at the peril of throwing the cost of any effort to secure a better price upon the other creditors. It is the duty of the assignee and of the court to take that course in the premises which, in their judgment, having due reference to the rights of the mortgagee, will be most beneficial to all the parties interested. *In re Ellerhorst et al.*, 7 B. R. 49; s. c. 2 Saw. 219.

The selling of property free from incumbrances is a matter of judicial discretion. The apportionment of costs is also a matter, to some extent, of judicial discretion. The district court, as incident to its power to adjust and liquidate the lien, is authorized to adjust the costs of the proceedings necessary to give effect to the specific lien, and does not exceed the bounds of sound discretion in charging upon the proceeds of the mortgaged property the costs of the proceedings adopted to enforce and liquidate the specific lien. The costs of the sale, including commissions to the assignee, may be charged upon the proceeds. *Ibid*.

Where property is sold free from incumbrances, under a proceeding instituted before the expiration of a lien, the rights of the lienor are deemed to be fixed from the commencement of the proceedings, and he need not renew or continue his lien. *Moran v. Schnugg*, 7 Ben. 399.

A sale of the property free from incumbrances does not pass to the purchaser the right to the growing crops which the tenant had agreed to pay by way of rent. *In re Bledsoe*, 12 B. R. 402; s. c. 10 Pac. L. R. 46.

Where the record shows a proceeding to bring the general jurisdiction to bear on the special case, the purchaser need not look beyond the order of sale to see whether every particular has been complied with in the appointment and qualification of the assignee. *Zeigler v. Shomo*, 78 Penn. 357.

Where an assignee sells property which is incumbered or in dispute under an order of court, it is the order and not the assignment which empowers him to act. *Ibid*.

A sale may be made in bulk where that is the only possible mode which will enable purchasers to buy with confidence. *Jerome v. McCarter*, 15 B. R. 546.

Where the property is sold free from incumbrances, the assignee can only deduct the costs of the proceedings necessary for proving the lien, and must appropriate the balance of the proceeds to the payment of the claim of the secured creditor. *In re Hambright*, 2 B. R. 498; s. c. 2 L. T. B. 61; s. c. 1 C. L. N. 201; *in re Davenport*, 3 B. R. 77; s. c. 2 L. T. B. 136; *in re Eldridge*, 4 B. R. 498; s. c. 2 Biss. 362; *in re Blue Ridge R. R. Co.*, 13 B. R. 315.

In a proceeding to sell property free from incumbrances, the bankruptcy court has no authority to adjust the claims of a trustee under a mortgage, nor to ascertain what is due by the trustee to his counsel. *In re Blue Ridge R. R. Co.*, 13 B. R. 315.

Costs in bankruptcy are left by the act entirely in the discretion of the court, and questions arising in relation to them must be disposed of upon equitable principles. It can not be denied upon authority as well as principle, that if a mortgagee allows the mortgaged property to be so used and managed, and the mortgage itself to be so placed and continued upon the records in a condition to induce in the minds of reasonable men a suspicion or belief that the mortgage is a mere cover to protect the property of the mortgagor from his creditors, and the creditors act upon such suspicion or belief, they should be reimbursed their costs and expenses out of the mortgage fund, notwithstanding the mortgage is eventually held to be valid, there being no other assets. A mortgage given for \$4,000, when only \$1,000 is actually advanced, is *prima facie* fraudulent, and creditors who have endeavored to have it declared void are entitled to be reimbursed the amount of their reasonable costs, expenses, and disbursements in the proceedings in bankruptcy, including the sale of the mortgaged property, from the proceeds of such sale. *In re Dumont*, 4 B. R. 17; s. c. 2 L. T. B. 114.

If the property is sold free of incumbrances, the mortgagee can not be allowed the costs and commissions of a *scire facias* to foreclose the mortgage, issued and served on the bankrupt alone after the commencement of the proceedings in bankruptcy. *In re Abraham A. Devore*, 24 Pitts. L. J. 185.

If an assignee voluntarily paid a mortgage debt in gold prior to the change in the law made by the last decisions of the Supreme Court, he is not entitled to relief. All matters that were closed by the parties before the change are, in the absence of fraud, beyond the reach and influence of any retrospective action of the law caused by such change. In *re Henry M. Dunham*, 29 Leg. Int. 389; s. c. 2 Md. L. R. 485.

The petition for leave to sell property free from incumbrances may, in case of improper conduct, be dismissed with costs to be paid by the assignee personally and not out of the estate. In *re H. Brinkman*, 6 B. R. 541; s. c. 7 B. R. 421.

If the estate is sold free from incumbrances, the State court may grant a mandamus against the State officer, directing an erasure of the mortgages. *Conrad v. Prieur*, 5 Rob. (La.) 49.

The district court has jurisdiction to decree an erasure of the mortgages, where the property is sold free from incumbrances. *Ibid.*

**Surrender to Creditor.**—The assignee is invested with the right, independent of the sanction of the court, to release the bankrupt's right of redemption to the secured creditor. *Second National Bank v. State National Bank*, 11 B. R. 49; s. c. 10 Bush. 367.

The powers of an assignee are in no sense judicial, and his acts bind only those whom he represents. In the sale of the estate of a bankrupt he acts only for the creditors who prove their claims, and in such matters he can conclude the rights of no one else. The act of the assignee in allowing a creditor to retain an alleged security, after deducting the value of the same from the amount of the claim, does not include other creditors claiming the same security, if they have not proved their claims. *Ibid.*

When the assignee, in the exercise of the discretion left to him, abandons all claim to incumbered property, then the State courts may subject such property to the satisfaction of the secured creditor's claim, and may afford him any relief touching such property as he would have been entitled to if the proceedings in bankruptcy had never been instituted. *Ibid.*

**Sale Subject to Incumbrances.**—The assignee may sell, without petitioning the court, or without any order of the court, any property of the bankrupt in his possession incumbered in any manner. But when he so sells, he does so subject to any and all lawful incumbrances, and can convey no higher or better interest. The proceeds of such a sale are supposed to be the price or value of the interest so sold, and with a knowledge of the incumbrances. In *re Mebane*, 3 B. R. 347; in *re McClellan*, 1 B. R. 389; *Kelly v. Strange*, 3 B. R. 8; *King v. Bowman*, 24 La. An. 506; *Second National Bank v. State National Bank*, 11 B. R. 49; s. c. 10 Bush. 367; *Ray v. Norseworthy*, 12 B. R. 145; s. c. 25 La. An. 600; s. c. 23 Wall. 128; *Wicks & Co. v. Perkins*, 13 B. R. 280; s. c. 1 Woods. 383.

When property subject to an incumbrance has been sold without an order of the court, it will be taken for granted, that the assignee sold only such right or title to the property as was vested in him, and, therefore, sold it subject to the incumbrance. *Kelley v. Strange*, 3 B. R. 8; *Meeks v. Whatley*, 4 B. R. 498; *Linthicum v. Fenley*, 11 Bush. 131.

Where property is sold subject to liens, the purchaser takes the title subject to the terms of the sale. *Seibel v. Simeon*, 62 Mo. 255.

Property may be sold clear of incumbrances, to the prejudice of the rights of no one, by an agreement between the assignee and a secured creditor, and the creditor will then be entitled to be paid out of the balance of the proceeds that remain after the payment of the costs of sale and the lawful commissions of the assignee. *In re Mebane*, 3 B. R. 347.

As a general rule of equity jurisprudence, there is an equity of redemption in chattel mortgages. In Massachusetts, the statute remedy is not exclusive. The mortgagor may tender performance, and have his action at law; or, if for any reason this remedy is incomplete, he may proceed in equity. *Foster v. Ames*, 2 B. R. 455; s. c. *Lowell*, 313.

It is not necessary for the assignee to take any proceeding whatever in regard to incumbered property, unless by so doing he can realize a net sum of money free from incumbrances for the benefit of the estate. It would be idle to go through the form of selling the property, if the property be of less value than the amount of the incumbrance. *In re Lambert*, 2 B. R. 426; *In re Bowie*, 1 B. R. 628; s. c. 1 L. T. B. 97; s. c. 15 Pitts. L. J. 448.

If the petition ask for leave to sell the property subject to certain specified incumbrances, and the report sets forth that the property was sold free from all incumbrances, except those specified, the report will not be adopted by a mere confirmation of the sale. It should explicitly appear in the order of confirmation that the report was confirmed, and that the sale as such was confirmed, so as to show that the court acted upon that part of the report, and confirmed the sale by making it free and clear from all other incumbrances. That is indispensably necessary in order to make it binding on the court, because it could only be effectual by a ratification brought home to the knowledge of the court of the particular clause in the report. The assignee acted under a power. He was bound to follow the instructions of the power. If it is sought to be enlarged, the court ought to know of that enlargement, and ratify and confirm it as such. *In re McGilton et al.*, 7 B. R. 294; s. c. 3 Biss. 144.

If a lien creditor is present at a sale by an assignee, he is present in contemplation of law, only with knowledge of the facts which are stated in the petition for sale, and in the order of the court. If the petition simply asks for leave to sell the property subject to certain incumbrances, it is questionable whether he would be bound by an unauthorized statement of the assignee. *Ibid.*

If the assignee sells the property without an order of the court, a secured creditor may enforce his claim against the property in a State court, although he has proved his debt. *King v. Bowman*, 24 La. An. 506.

The fact that land against which a mortgagee seeks to enforce his mortgage has been sold by the assignee, does not deprive the State tribunal of jurisdiction over the suit. *Ibid.*

If the property is sold subject to a lien, the lien claimant may proceed in the State court to enforce his lien. *Douglass v. St. Louis Zinc Co.*, 56 Mo. 388.

Where hypothecary proceedings are instituted after the sale of the property by the assignee, it is not necessary to serve notices of the proceedings on the assignee or the bankrupt. The assignee has no interest in the hypothecated property, and the discharged bankrupt is no longer bound for the debt. *Ray v. Norseworthy*, 12 B. R. 145; s. c. 25 La. An. 600; s. c. 23 Wall. 128.

**Sale on Application of Secured Creditor.**—Liens upon the property of the bankrupt, so long as it remains in the possession of the bankruptcy court, can only be enforced in the district court sitting as a court of bankruptcy. In *re People's Mail Steamship Co.*, 2 B. R. 553; s. c. 3 Ben. 226; *Davis, Assignee of Bittel, et al.*, 2 B. R. 392; *Jones v. Leach*, 1 B. R. 595; in *re Vogel*, 2 B. R. 427; s. c. 3 B. R. 198; s. c. 7 Blatch. 18; s. c. 2 L. T. B. 154; *Lee v. Franklin Av. S. Inst. et al.*, 3 B. R. 218; s. c. 1 C. L. N. 370; in *re Kerosene Oil Co.*, 2 B. R. 528; s. c. 3 B. R. 125; s. c. 3 Ben. 35; s. c. 6 Blatch. 521; s. c. 2 L. T. B. 79; in *re Israel M. Rosenberg*, 3 B. R. 130; s. c. 3 Ben. 366; in *re J. M. Snedaker*, 3 B. R. 629; in *re High et al.*, 3 B. R. 192; s. c. 1 L. T. B. 175; s. c. 2 C. L. N. 9.

The filing of a petition in bankruptcy operates from the time of such filing as a practical restraint on a pledgee of the property of the bankrupt, who is notified of such filing, from disposing of it otherwise than at his own risk, until the bankruptcy court can act in the premises. In *re Grinnell & Co.*, 9 B. R. 29; s. c. 7 Ben. 42.

A judgment which is a lien upon land must be proved, and can only be enforced through the bankruptcy court. *Davis v. Anderson*, 6 B. R. 145.

For just and equitable purposes and to guard against fraud, the act rightfully takes the pledged property or lien out of the power of the secured creditor's control or management in reducing it to money in his chosen way without responsibility, and places it in the hands of the assignee of the bankrupt, who, being an agent to the court, and at the same time the representative of the rights of all parties in interest, is supposed to be above the temptation to fraud, and directs him in such capacity and under the pledge of his official bond as assignee, and under the direction of the court, to convert such mortgaged or pledged property into money, and to distribute the same under the provisions of the act, with due regard to all the priorities shown to exist in the proceedings in bankruptcy by the proof of the claims against the bankrupt. So far from taking any right or rights from the secured creditors, under the mortgage, lien, or pledge by which he holds the same, it simply regulates the mode and means of foreclosing the mortgage or other lien, and of reducing such security to money, in order that the court may be able to enforce exact justice, and to see that the rights of all the creditors are secured to them under the proof of claims, and under the law. In *re J. M. Snedaker*, 3 B. R. 629.

Where the members of a firm are adjudged bankrupts individually, and not as copartners, a pledgee holding collaterals to secure a firm debt need not obtain an order of the court for leave to sell the same. In *re Geo. B. Grinnell*, 9 B. R. 137.

If a corporation pledged its own bonds to secure a loan, the pledgee may sell them after an adjudication. *Jerome v. McCarter*, 15 B. R. 546.

A secured creditor may apply to the district court to have the incumbered property sold, and the proceeds applied pro tanto toward the payment of his debt. In *re T. R. Stewart*, 1 B. R. 278; s. c. 1 L. T. B. 16; in *re Bigelow et al.*, 1 B. R. 632; s. c. 2 Ben. 480; s. c. 1 L. T. B. 95; *Davis, Assignee of Bittel et al.*, 2 B. R. 392; in *re Ruehle*, 2 B. R. 577; s. c. 1 L. T. B. 59; s. c. 1 C. L. N. 186; s. c. 16 Pitts. L. J. 5.

The application can not be made until the claim has been duly proved. To grant permission for a sale without proof would be to assume the existence of facts which may never be made to appear. For it can not otherwise be known that the creditor has any debt, or, if he has, that the property is properly held as security for the debt. In other words, to grant the order without proof, would be to assume as proved the facts upon which the right to the order is, by the bankruptcy act, made dependent. In *re Bigelow et al.*, 1 B. R. 632; s. c. 2 Ben. 480; s. c. 1 L. T. B. 95; in *re Bridgman*, 1 B. R. 312; s. c. 2 B. R. 252; in *re Frizelle et al.*, 5 B. R. 119; in *re Geo. B. Grinnell*, 9 B. R. 137. *Contra*, in *re High et al.*, 3 B. R. 192; s. c. 1 L. T. B. 175; s. c. 2 C. L. N. 9.

When property is claimed under deed, by persons other than the bankrupt or assignee, a creditor asserting that he has a lien thereon, and desiring to enforce the same, must institute an original proceeding for that purpose and make the other claimants parties thereto. In *re C. Dean*, 3 B. R. 769.

A subsequent mortgagee who was not made a party to a petition against the assignee by a prior mortgagee to reform his mortgage, may state this as an objection to a sale or in claiming the proceeds. *Fowler v. Hart*, 13 How. 373.

The sale can not take place before an assignee is appointed. The assignee is the only person who can represent the creditors other than the particular secured creditor. Whether such other creditors are wholly unsecured or insufficiently secured, they have an interest in seeing that the debt of the particular secured creditor is duly proved, and is not fraudulent or illegal, and that the securities held for it are applied on it at their proper value, whether such value is ascertained by agreement between such particular secured creditor and the assignee, or by a sale. Before such application of the securities is made, the assignee has a right on behalf of such other creditors to elect whether he will redeem the pledged property by paying the debt and taking the property, or whether he will give it up to the secured creditor on receiving an agreed sum as its excess of value over the debt. Nothing of all this can be done until there is an assignee. In *re Geo. B. Grinnell*, 9 B. R. 137.

Notice of the application should be given to the assignee. In *re J. O. Smith*, 1 B. R. 243; s. c. 2 B. R. 297; s. c. 2 Ben. 113; in *re High et al.*, 3 B. R. 192; s. c. 1 L. T. B. 175; s. c. 2 C. L. N. 9; in *re S. F. Frizelle*, 5 B. R. 122.

Generally, when the proceeding is by a secured debtor, notice upon the assignee who represents the estate will be sufficient, without notice

to the creditors, though exceptions might be allowed to this rule in some cases very properly. In *re High et al.*, 3 B. R. 192; s. c. 1 L. T. B. 175; s. c. 2 C. L. N. 9.

If the time for the payment of a debt secured by a mortgage has been extended, an order of the bankruptcy court passed without notice to the bankrupt permitting the mortgagee to sell before the time of the extension expires, will be void as to the bankrupt. In *re Betts*, 15 B. R. 536; s. c. 4 Cent. L. J. 558; s. c. 13 Pac. L. R. 203.

A secured creditor can not apply to have his lien satisfied until something has been realized out of the property subject to his lien. In *re Fallon*, 2 B. R. 277.

The difference between the net proceeds of the sale of mortgaged property and the amount of the mortgaged debt is not to be paid in full out of the general funds of the estate. This difference is simply a claim against the estate, like all other unsecured claims. In *re Purcell & Robinson*, 2 B. R. 22; s. c. 2 Ben. 485; s. c. 36 How. Pr. 42; in *re Ruehle*, 2 B. R. 577; s. c. 2 L. T. B. 59; s. c. 1 C. L. N. 186; s. c. 16 Pitts. L. J. 5; in *re Winn*, 1 B. R. 496; s. c. 1 L. T. B. 17.

Inasmuch as the lien creditor seeks and enjoys the aid of the district court in enforcing and realizing his lien, he is bound to pay the cost incurred in obtaining this aid. But, with regard to the costs of general administration, in which he has no concern, and in which he can have no interest until his lien is either satisfied or realized, it would be inequitable to require him to bear the burden of them. In *re Hambright*, 2 B. R. 498; s. c. 2 L. T. B. 61; s. c. 1 C. L. N. 201; in *re Davenport*, 3 B. R. 77; s. c. 2 L. T. B. 136.

The fund should be charged with the costs and expenses of sale and orders relative thereto, and its proportion of the general expenses of the estate. In *re York & Hoover*, 3 B. R. 661.

**Proceedings in State Courts.**—After the commencement of proceedings in bankruptcy, a mortgagee can not foreclose the mortgage, under a power of sale contained therein, in the mode and manner prescribed by the State statutes. *Phelps v. Sellick*, 8 B. R. 390; *Whitman v. Butler*, 8 B. R. 487.

The power of a mortgagee to sell the property in the name of the mortgagor and his attorney is not affected by the bankruptcy of the mortgagor, for it is a power coupled with an interest. *Hall v. Bliss*, 14 B. R. 329; s. c. 118 Mass. 554. *Contra*, *Lockett v. Hill*, 9 B. R. 167; s. c. 1 Woods, 552.

Where the title does not, under the State laws, pass to the mortgagee, a power to sell is not a power coupled with an interest, and is revoked by the bankruptcy of the mortgagor. *Lockett v. Hill*, 9 B. R. 167; s. c. 1 Woods, 552.

The mere possession of the property is not of that dignity and nature which can be engrafted on a power in a mortgage, so as to make it a power coupled with an interest. *Ibid.*

If the power to sell is limited to a certain period, it is lost by a failure to exercise it during that period. *Ibid.*



A mortgagee holding a power of sale can not purchase the land himself, either in severalty, joint tenancy, or otherwise. He can not be vendor and vendee; the characters are inconsistent, and the power does not extend so far. *Ibid.*

Where the right to purchase is provided for in the mortgage, a mortgagee may purchase at a sale made by him in pursuance of a power contained in a mortgage. *Hall v. Bliss*, 14 B. R. 329; s. c. 118 Mass. 554.

A mortgagee holding a power of sale coupled with an interest, should, after the bankruptcy of the mortgagor, convey the property in his own name, and not in that of the bankrupt, who is civiliter mortuus, or at least incapable in law to execute a deed of conveyance. *Lockett v. Hill*, 9 B. R. 167; s. c. 1 Woods, 552.

A power of sale in a mortgage is merely cumulative, and does not bar a foreclosure. *Ibid.*

A purchaser at a sale under a deed of trust, after the commencement of proceedings in bankruptcy against the grantor, obtains a legal title which will be deemed valid until it is set aside by the assignee. *McGready v. Harris*, 9 B. R. 135; s. c. 54 Mo. 137; *Roden v. Jaco*, 17 Ala. 344.

A sale under a deed of trust is valid, although the holder of a second deed of trust on the property was bankrupt at the time thereof. *Long v. Rogers*, 6 Biss. 416.

A mortgagee holding a mortgage of personal property may take possession of the property after the commencement of proceedings in bankruptcy. *Bentley v. Wells*, 61 Ill. 59.

Where no advantage can result to the estate of the bankrupt, there is no reason why the district court should interfere with a suit brought in a State court after the commencement of the proceedings in bankruptcy to enforce a lien, when neither the assignee nor any creditor invokes such interference, and it appears without contradiction that the equity of redemption is of no value. There is no excess of value to be paid to the assignee on his releasing the right of redemption. There is nothing to be sold subject to the mortgage which will yield anything, and any action of the district court for the liquidation and settlement of the amount of the lien, and for the sale of the property to satisfy it, would be a mere expense to the estate, producing nothing. Under such circumstances, the district court may exercise a discretion on the subject, and may decline interference. *In re Iron Mountain Co.*, 4 B. R. 645; s. c. 9 Blatch. 320; *in re Bowie*, 1 B. R. 628; s. c. 1 L. T. B. 97; s. c. 15 Pitts. L. J. 448; *Tichenor v. Allen*, 13 Gratt. 15.

The case should be clear, and the proof that nothing can be saved to the estate should be satisfactory. If the court can see that any prejudice to the interests of creditors may happen, it should not permit those interests to be put at hazard by a proceeding to which the general creditors are not parties, and in respect to which they have no protection but through the proceedings in bankruptcy. *In re Iron Mountain Co.*, 4 B. R. 645; s. c. 9 Blatch. 320.

In all matters of controversy, where the subjects in dispute are of a local nature, the rights of parties must be determined by actions in the

local courts. Thus the title and disposition of real estate, where there are adverse claims, can not generally be determined in a court out of the State in which the land is situated. The right of a mortgagee to have a foreclosure of his mortgage can not be administered by a district court in another State, sitting as a court of bankruptcy. In such a case, the State court where the land is situated can afford a remedy by foreclosure and sale. *Whitridge v. Taylor*, 66 N. C. 273.

The claimant of a lien, by electing to pursue the property in the State court, will deprive himself of any right to prove his debt in bankruptcy for the deficiency. In *re Iron Mountain Co.*, 4 B. R. 645; s. c. 9 *Blatch*. 320; *Brown v. Gibbons*, 13 B. R. 407; s. c. 37 *Iowa*, 654.

A foreclosure to which the assignee is not made a party is of no effect as to him, and his equity of redemption remains in full force. *Winslow v. Clark*, 47 N. Y. 261; s. c. 2 *Lans.* 377; *Barron v. Newberry*, 1 *Biss.* 149; *Truitt v. Truitt*, 38 *Ind.* 16; *City Bank v. Walton*, 5 *Rob. (La.)* 158; *Cole v. Duncan*, 58 *Ill.* 176; *Pierce v. Phillips*, 3 *Robt.* 488.

If the bankrupt also had an interest in the mortgage debt, the assignee is a necessary party to an action to foreclose the mortgage, although he has sold all the bankrupt's interest in the land. *Clark v. Clark*, 56 N. H. 105.

A proceeding instituted in a State court to foreclose a mortgage after the commencement of the proceedings in bankruptcy, without making the assignee of the mortgagor a party thereto, is valid as against those who are parties thereto. *Brown v. Gibbons*, 13 B. R. 407; s. c. 37 *Iowa*, 654; *Hulverson v. Hutchinson*, 39 *Iowa*, 316.

After a surrender in bankruptcy, the bankrupt has no interest in property mortgaged by him, and can not be proceeded against by the appointment of a curator ad hoc to represent him in an action to foreclose the mortgage. A service of the citation on such curator is a nullity, and the proceeding is void. *Kennedy v. Rust*, 25 *La. An.* 554.

After the discharge of the bankrupt has been granted, the mortgagee may file a bill to foreclose the mortgage in a State court. *Cole v. Duncan*, 58 *Ill.* 176; *Truitt v. Truitt*, 38 *Ind.* 16; *Pierce v. Wilcox*, 40 *Ind.* 70.

A mortgagee does not lose the lien of his mortgage by omitting to prove it in bankruptcy, but may enforce it after the proceedings in bankruptcy are terminated. *Wicks & Co. v. Perkins*, 13 B. R. 280; s. c. 1 *Woods*, 383.

If the assignee does not seek to redeem the mortgaged property, the mortgagee may institute an action in a State court to foreclose the mortgage. *Brown v. Gibbons*, 13 B. R. 407; s. c. 37 *Iowa*, 654; *McKay v. Funk*, 13 B. R. 334; s. c. 37 *Iowa*, 661.

When the bankruptcy court consents, a mortgagee may foreclose the mortgage in a State court. *Société D'Espargnes v. McHenry*, 49 *Cal.* 351.

If a decree to foreclose a mortgage does not fix any personal liability upon the bankrupt, it is proper where the bankrupt transferred the property before his bankruptcy, although the proceedings to foreclose the mortgage were instituted in a State court after that time. *Cockrill v. Jones*, 28 *Ark.* 193.

Where no action is taken by the assignee or the creditor in the bankruptcy court, the State court has jurisdiction to make the lien available. *Reed v. Bullington*, 11 B. R. 408; s. c. 49 Miss. 223.

If the bankrupt transferred the property before the commencement of the proceedings in bankruptcy, the holder of a mechanic's lien claim thereon may enforce it in a State court. *Glendon Company v. Townsend*, 120 Mass. 346.

If the assignee appears in the State court and claims a surplus arising from the foreclosure of a mortgage, without objecting to the power of the court to render a judgment, he can not, when the decision is adverse to him, appeal to the supreme court, and raise the objection there. *Mays v. Fritton*, 11 B. R. 229; s. c. 20 Wall. 414; *Scott v. Kelly*, 12 B. R. 96; s. c. 22 Wall. 57.

A *fi. fa.* may be issued after the commencement of proceedings in bankruptcy to enforce the lien of the judgment. *Russell v. Cheatham*, 16 Miss. 703; *McCance v. Taylor*, 10 Gratt. 580; *Freeny v. Ware*, 9 Ala. 370; *Talbert v. Melton*, 17 Miss. 9; *Sorden v. Gatewood*, 1 Ind. 107. *Contra*, *Johnson v. Poag*, 39 Tex. 92; *Stemmons v. Burford*, 39 Tex. 352; *Blum v. Ellis*, 13 B. R. 345; s. c. 73 N. C. 293.

The bankruptcy court will treat the enforcement of a lien in the State courts as valid, on the application of the lien holder, and a showing by him that the estate and the other creditors will suffer no injury thereby. *Phelps v. Sellick*, 8 B. R. 390.

A purchaser from the mortgagee is a necessary party to the bill to redeem. *Winslow v. Clark*, 47 N. Y. 261; s. c. 2 Lans. 377.

An owner of an equity of redemption in real estate, which has been sold under a foreclosure to which he was not a party, can not recover against the mortgagee or the purchaser at the mortgage sale, a personal judgment for the value of his interest in the mortgaged premises. *Ibid.*

If a creditor proves his debt, he can not afterward resort to a State tribunal to enforce his lien against property which was the subject of proceedings in bankruptcy to which he was a party. *Spilman v. Johnson*, 27 Gratt. 33.

If a judgment creditor proves his claim as unsecured, and receives a dividend thereon from the estate of one joint debtor, he can not enforce the lien of the judgment against the other joint debtor through a State court. *Heard v. Jones*, 15 B. R. 402; s. c. 56 Ga. 271.

The district court may authorize a judgment creditor to proceed in the usual way to collect his judgment, if that course seems best for the estate. *In re McGilton et al.*, 8 B. R. 294; s. c. 3 Biss. 144.

In order to entitle a mortgagee to apply to the bankruptcy court for leave to foreclose his mortgage in another court, he must prove his debt as a secured debt. The petition must allege this fact, and also the date of the proof and the amount of the debt as proved. The mortgage and the property covered by it must be fully described in the petition, and it must be stated whether there are other and what incumbrances on such property, with a full description of such incumbrances, if any. It must

be made to appear, that the estate has no ultimate interest in the mortgaged property, and to this end the petition must state the actual value of the mortgaged property, in order that the court may be informed whether there is or is not a surplus of value over the incumbrances. In case the value of the property is greater than the incumbrances, it must be made to appear that the rights of the petitioner can not be fully protected by a sale of the property by the assignee under the bankruptcy proceedings, either subject to the incumbrances or free from the same, and the debt or debts paid out of the proceeds, and to this end the petition must state the facts from which such conclusion is claimed to follow. *In re Philo R. Sabin*, 9 B. R. 383.

If a proceeding to foreclose a mortgage is instituted in a State court after the commencement of the proceedings in bankruptcy, it may be stayed on the application of the assignee. *Markson v. Heany*, 12 B. R. 484; s. c. 47 Ind. 31.

ACT OF 1867, § 5076. Creditors residing within the judicial district where the proceedings in bankruptcy are pending shall prove their debts before one of the registers of the court, or before a commissioner of the circuit court within the said district. Creditors residing without the district, but within the United States, may prove their debts before a register in bankruptcy or a commissioner of a circuit court in the judicial district where such creditor or either one of joint creditors reside; but proof taken before a commissioner shall be subject to revision by the register of the court.

Statute revised — March 2, 1867, ch. 176, § 22, 14 Stat. 527; July 27, 1868, ch. 258, § 3, 15 Stat. 228. Prior statutes — April 4, 1800, ch. 19, § 6, 2 Stat. 23; Aug. 19, 1841, ch. 9, §§ 5, 7, 5 Stat. 444, 446.

A proof of a debt taken before a justice of the peace is not duly proved, and must be rejected. *In re Strauss*, 2 B. R. 48.

The proof of a debt in bankruptcy may be taken by a register or by a commissioner, in all cases, whether of a resident or nonresident creditor, or whether such commissioner holds his office in the same town or in the same building in which a register holds his office, the only limitation being that it shall be taken before a register or commissioner of the same judicial district in which the creditor resides or in which the proceedings are pending. The law never did require, nor does it seem to have contemplated, that such proof should be taken before the register to whom the case in bankruptcy has been referred, to the exclusion of all others. *In re W. B. Merriek*, 7 B. R. 459; *in re L. Sheppard*, 1 B. R. 439; s. c. 1 L. T. R. 49; s. c. 7 A. L. Reg. 484. *Contra*, *in re Haley*, 2 B. R. 36.

It is no doubt the wiser policy for creditors, in all cases where they can do so conveniently, to make their proof before the register in charge, because he is thereby afforded an opportunity of putting such questions to them and making such explanations to them as to their rights and lia-

bilities as he may see fit, and the creditor may then be saved the trouble of being afterward summoned before the court to submit to an examination in regard to his claim. But all the court can do is to commend that course to creditors as the wiser policy. In *re W. B. Merrick*, 7 B. R. 459.

The court has no discretion to refuse to receive and file a proof of debt which appears on its face to have been taken by a proper officer and to be correct in form and substance. By the receipt and filing of the proof of debt, and by it alone, the court obtains jurisdiction of the claim and of the creditor presenting it, and then, and then only, does the revisory power of the court over such proof commence. *Ibid*.

The receiving and filing of a proof of debt concludes nothing. Unless otherwise ordered, it entitles the creditor to be placed on the list of creditors, vote for assignee, and receive dividends, but the court may otherwise order and do all things in regard to it which the act authorizes to be done. *Ibid*.

A proof made by the creditor before his own attorney can not be allowed. In *re Henry Nebe*, 11 B. R. 289.

A proof of debt made by an officer of a corporation before a register in a State other than that under whose laws the corporation was organized is insufficient. *Ansonia B. & C. Co. v. Babbitt*, 15 N. Y. Supr. 157.

ACT OF 1874, § 5076A (June 22, 1874, ch. 390, § 20, 18 Stat. 186). That in addition to the officers now authorized to take proof of debts against the estate of a bankrupt, notaries public are hereby authorized to take such proof, in the manner and under the regulations provided by law; such proof to be certified by the notary and attested by his signature and official seal.

The impression of a notarial seal can not be received as evidence unless the name of the notary is engraved on the seal so as to make it his official seal. In *re Henry Nebe*, 11 B. R. 289; in *re Port Huron Dry Dock Co.*, 14 B. R. 253.

The requisites of a notarial seal are determined by the law of the locality from which he derives his authority. In *re Wm. W. Phillips*, 14 B. R. 219; s. c. 8 C. L. N. 409.

An official seal is an impression on the paper directly, or on wax or wafer attached thereto, made by the official as and for his seal. *Ibid*.

In the absence of express legislation, an official seal need not contain the name of the official. *Ibid*.

Any impression made upon sealing-wax or wafer adhering to the paper, without any device or words indicative of the particular official, is entitled to judicial sanction as evidence of the official character of the individual who signs the jurat. *Ibid*.

It is the seal, and not its composition or character of words and devices, which raises the presumption of official character of which the courts take judicial notice. *Ibid*.

The presumption is that a seal is the official seal of the person it purports to be, and who subscribed the jurat. *Ibid.*

The power given to notaries to take proof of debts carries with it the incidental power to take acknowledgments of letters of attorney. *In re Butterfield & Burr*, 14 B. R. 105; *in re McDuffee*, 14 B. R. 336.

§ 5076B (Act of August 15, 1876, ch. 304, 19 Stat. 206). Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notaries public of the several States, Territories, and the District of Columbia be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States circuit court may now lawfully take or do.

A bankrupt may verify his schedules before a notary public. *In re John W. Bailey*, 15 B. R. 48.

ACT OF 1898, CH. 6, § 57. **Proof and Allowance of Claims.**—  
(a) Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor. \* \* \*

(j) Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law. \* \* \*

(m) The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

(n) Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided*, That the right

of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

ACT OF 1867, § 5077. To entitle a claimant against the estate of a bankrupt to have his demands allowed, it must be verified by a deposition in writing, under oath, and signed by the deponent, setting forth the demand, the consideration thereof, whether any and what securities are held therefor, and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person, for his use, received any security or satisfaction whatever other than that by him set forth; that the claim was not procured for the purpose of influencing the proceedings in bankruptcy; and that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the claim, or any part thereof, or to take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor for assignee, or any action on the part of such creditor, or any other person in the proceedings, is or shall be in any way affected, influenced or controlled. No claim shall be allowed unless all the statements set forth in such deposition shall appear to be true.

Statute revised — March 2, 1867, ch. 176, § 22, 14 Stat. 527.

**The Proof.**—The statement of the debt in the schedule is not a proof of it. It may be stated in fraud, and may not exist. The bankrupt may have made payments, or may have counterclaims and offsets. The debt must be proved by the oath of the creditor. This applies to a lien creditor as well as to an unsecured creditor. *Davis, Assignee of Bittel et al.*, 2 B. R. 392.

A creditor need not wait until the first meeting of creditors to prove his claim, nor is it the duty of the register to notify the bankrupt of the filing of the proof. *In re Patterson*, 1 B. R. 100; s. c. 1 Ben. 448.

Where notes were exchanged, and holder has received a payment from the maker, he can only prove for balance against the surety. *Ex parte Harris et al.*; *In re Cochrane, Jr.*, 16 B. R. 432.

Creditor could not be excluded as a witness, on ground of interest, from proving this claim, under the law of 1867. *In re Merrill*, 16 B. R. 35.

A creditor, though the wife of the bankrupt, is a competent witness. *In re Richards*, 17 B. R. 572.

The holder and owner of a claim can alone make the proof. *In re Ford & Co.*, 18 B. R. 426.

A "deposition" by a debtor, proving his claim against the estate of the bankrupt, is neither an affidavit nor a deposition, as known in the ordinary practice of law. It is the result of an examination of the creditor

made by the officer of the law authorized to make it. The creditor is not only required to testify to the amount of his claim, but he must testify to its consideration, and whether he has received any payment, or holds any security whatever for the same, and to other facts required by the act. In no other court of justice is such testimony required for the due proof of any debt, and it is evident that Congress intended that the court and its officers should, by a careful examination of the creditor, purge his conscience, and ascertain the real nature of his claim, and that no fraud or combination, either for or against the bankrupt, exists. In *re Strauss*, 2 B. R. 48; in *re Elder*, 3 B. R. 670; s. c. 1 Saw. 73; s. c. 1 L. T. B. 198; s. c. 3 L. T. B. 140.

There is no requirement that the deposition shall be written by the officer taking it, or by some disinterested person in his presence, or by the witness. Neither is it of so much importance in view of the fact that what the creditor must swear to is clearly and explicitly pointed out in the act, and the exact form in which he shall do it is also prescribed. It is a practice, however, not to be commended. It is far preferable, and more in accordance with the spirit of the act, that the officer, with the act and the form before him, should examine the creditor on oath touching the matter specified, and himself reduce the depositions to writing, or fill up the printed blank, if such is used. In *re W. B. Merrick*, 7 B. R. 459.

The proof of a debt against a firm should state that the firm or company, describing it by its firm name, and the individuals who composed it, was indebted to the creditor, and how and for what amount. It should not be uncertain whether the demand is a firm debt, or a joint claim against the individuals who compose the firm. In *re Walton et al.*, 1 Dedy, 510.

When partners are adjudged bankrupts, the result is, or may be, that several distinct estates are to be administered in that proceeding. There are the estate and debts of the partnership, and the separate estate and debts of each individual included in the partnership. Proof of a debt against either of these estates ought not to include or be joined with the proof of a debt against either of the others. Two distinct debts against different estates can not be included in one proof or deposition. *Ibid.*

A proof of debt can not be filed unless it is correctly entitled in the cause. In *re Pius Walther et al.*, 14 B. R. 273.

The proof should contain at least one full christian name of the creditor as well as his surname. In *re William H. Valentine*, 12 B. R. 389; s. c. 4 Biss. 317.

As a general rule, the proof of a claim must be established by the same degree and character of evidence as that required in a trial at law or a hearing in equity. In *re Northern Iron Company*, 14 B. R. 356.

If the deposition refers to an annexed account which merely gives dates and amount without stating the subject-matter of the account, that is not sufficient. In *re Port Huron Dry Dock Co.*, 14 B. R. 253.

The amount of interest to which a claimant is entitled is not to be determined by himself, but the data must be furnished by him under oath, and the computation is to be made by the register. *Ibid.*



A proof in due form makes out a *prima facie* case against an indorser, although there is no evidence of a protest, for the creditor is not obliged by the mere interposition of an objection to produce such evidence as would be necessary at an ordinary trial. In re W. A. Saunders, 13 B. R. 164.

Where a claim consists of a promissory note, the creditor must produce the note, or a copy thereof. In re Northern Iron Co., 14 B. R. 356.

Where a note appears to have been discounted after the commencement of the proceedings in bankruptcy, the holder must show something more from which his good faith may be inferred than a bare assertion that he has discounted it for a specified sum. In re Port Huron Dry Dock Co., 14 B. R. 253.

A statement that a note has been regularly protested on an indorser does not state a fact, and hence does not prove that the liability of the bankrupt has been fixed by demand and notice.

When the debt is evidenced by a promissory note, the note must be produced and exhibited when required by the register, the assignee, or the bankrupt, on proper occasions. Forms Nos. 31 and 33 distinctly show that a bill or note or security held for a debt is to be exhibited at the time the proof of debt is handed in; and Forms Nos. 27 and 31 show that it is to be again exhibited before a dividend is paid on it. When the note is merged in a judgment, it need not be produced. In re Knoepfel, 1 B. R. 70; s. c. 1 Ben. 398; In re Jaycox & Green, 7 B. R. 303.

The proof need not anticipate the defense of the statute of limitations, or give any facts to take the debt out of the statute. The statute may be waived, and, when relied on as a defense, must be set up affirmatively by the party making the defense. In re Knoepfel, 1 B. R. 70; s. c. 1 Ben. 398.

A transfer of the claim is valid unless it is fraudulent or oppressive. In re Morris, 12 B. R. 170.

One object of the law in requiring the consideration to be stated, is to enable the register to say whether it is legal in its nature, and will support a demand or promise; another, to show him whether or not the demand is unliquidated, and must be ascertained by assessment before its allowance; another, to afford the assignee means for comparing the books of the bankrupt with the proof. But the chief object, no doubt, is to put a check upon the proof of fraudulent and fictitious claims by requiring the claimant to give such a particular and definite statement of the consideration as will enable other creditors to trace out, discover, and expose the fraud or illegality of the claim, if any exist. The requirement is intended to be for the benefit of all other creditors of the estate and the bankrupt, and to prevent fraud. If the statement of the consideration is so general and indefinite as to afford no aid to the creditors in their inquiry as to the fairness and legality of the claim, it does not effect the object of the law, and must be held insufficient. A general statement that the consideration of a demand is goods, wares, and merchandise, or hay, barley, and board, is not sufficient. The kind of goods, the quantity, the price, and the time of delivery, if delivered at one time, or if delivered continuously through a period of time, that period should be

stated. If the proof falls short of this, the register ought not to consider it satisfactory, and should withhold his approval. *In re Elder*, 3 B. R. 670; s. c. 1 Saw. 73; s. c. 1 L. T. B. 198; s. c. 3 L. T. B. 140; *in re Northern Iron Co.*, 14 B. R. 356.

When the debt consists of a promissory note, the proof should set forth the consideration of the note, and state whether any and what payments have been made thereon. *In re Loder Bros.*, 2 B. R. 517; s. c. 3 Ben. 211; s. c. 1 L. T. B. 159; *in re Jaycox & Green*, 7 B. R. 303; *in re Lake Superior S. C. R. R. & I. Co.*, 7 B. R. 376.

The proof of a claim for contribution by a partner should set forth the amount paid by him for the debt on account of which the claim is made. *In re E. R. Stephens*, 6 B. R. 533; s. c. 3 Biss. 387.

The assignee of a simple chose in action or contract for the payment of money must state the consideration which passed between the original parties. *In re Lake Superior S. C. R. R. & I. Co.*, 10 B. R. 76.

The holder of a negotiable paper, who took it for value in good faith before the maturity thereof, need only state the consideration which he gave for such paper. *Ibid.*

The creditor must make the proof simpliciter, and he is not at liberty to interpose any protest or qualification or reservation. *Dutton v. Freeman*, 5 Law Rep. 447.

Where a party has a demand by its terms payable in coin, he should prove it according to its terms. The demand should then be entered upon the books of the assignee, as payable in coin, and the claimant will be entitled to receive his dividend thereon in the stipulated currency. *In re Elder*, 3 B. R. 670; s. c. 1 Saw. 73; s. c. 1 L. T. B. 198; s. c. 3 L. T. B. 140.

A note dated March 18, 1861, and payable three years after date, in current money of the State, is payable in lawful currency, and not in State treasury notes subsequently issued. The parties could not have contemplated payment in treasury notes. *In re Whittaker*, 4 B. R. 160.

**Proof of Secured Debt.**—A secured creditor can resort to one of three remedies: 1st. He may rely upon his security; 2d. He may abandon it, and prove the whole debt as unsecured; 3d. He may be admitted only as a creditor for the balance remaining after the deduction of the value of the security. Before he can prove his whole debt as a general creditor, he must surrender the security. Any attempt on the part of a creditor to prove a debt before a register, without complying with the conditions imposed by the law, should be disregarded by him. *In re Brand*, 3 B. R. 324; s. c. 2 L. T. B. 66.

A secured creditor should always prove his claim; any other theory is entirely irreconcilable with the provisions of the bankruptcy act. If the enforcement of his lien satisfies his demand, the debt will be discharged, but if it does not, then the balance remains as a general claim against the estate, like all other unsecured claims. *Davis, Assignee of Bittel et al.*, 2 B. R. 392; *in re Ruehle*, 2 B. R. 577; s. c. 1 L. T. B. 59; s. c. 1 C. L. N. 186; s. c. 16 Pitts. L. J. 5; *in re Winn*, 1 B. R. 496; s. c. 1 L. T. B. 17.

The bankruptcy court has jurisdiction over the debtor and all his creditors, and also over all demands affecting the bankrupt's estate. The re-

cured creditor must prove his demand, and obtain the aid of the bankruptcy court for its enforcement, and can not wait until bankruptcy proceedings are closed, and then enforce his lien through the State court. *Davis v. Anderson*, 6 B. R. 145.

The word "debt," as used in this section, means the amount upon which the dividend is to be computed, and the phrase "proved his debt," is equivalent to the phrase "share in the distribution of the assets." In *re Bigelow et al.*, 1 B. R. 632; s. c. 2 Ben. 480; s. c. 1 L. T. B. 95; *Jervis v. Smith*, 3 B. R. 594; s. c. 7 Abb. Pr. (N. S.) 217.

This rule that a creditor, having security for his debt, is to be admitted as a creditor only for the balance of his debt, remaining after the deduction of the value of his security, had its origin in chancery, and probably in the doctrine of election. The debt or obligation of the debtor is the principal thing; the pledge, the collateral or incident. If the debtor makes default, the creditor has a right of election as to his remedies. He may institute a personal action against his debtor upon his obligation, and by means of judgment and execution thereon, collect his debt out of the estate of his debtor, or he may proceed to make his collateral securities available to the payment of his debt. The natural and usual course is to proceed against the debtor, in the first instance, by a personal action. If the collateral securities have not, by some conventional act or intervening equity, become the primary fund for the payment of the debt, there is nothing in reason or natural justice which requires the creditor to proceed against the securities in the first place. But the lord chancellor, in the exercise of his summary powers over suitors and the commissioners of bankruptcy, long before any statutory provision, was accustomed to compel creditors to elect between the commission and the other remedies they might have for the recovery of their debts, and to stand to the election; and he restrained the commissioner from admitting a lien creditor or permitting him to prove his debt until he had exhausted his lien or security. Subsequently the practice of valuing securities was adopted to avoid delays. *Jervis v. Smith*, 3 B. R. 594; s. c. 7 Abb. Pr. (N. S.) 217.

A deposition, according to Form No. 21, is such a proof as is allowed by this section, even though the value of the security is not determined, nor the property sold. In *re Bridgman*, 1 B. R. 312; s. c. 2 B. R. 252; in *re Bigelow et al.*, 1 B. R. 632; s. c. 2 Ben. 480; s. c. 1 L. T. B. 95; in *re Ruehle*, 2 B. R. 577; s. c. 1 L. T. B. 59; s. c. 1 O. L. N. 186; s. c. 16 Pitts. L. J. 5.

The value of the securities held by the creditor is not required by the bankruptcy act to be set forth in the deposition, and Form No. 21 only requires an estimate of that value to be made. A creditor does not prove, as against the estate, or offer to prove, the whole indebtedness of the bankrupt exhibited in his deposition, when against that indebtedness are set out securities held therefor, the value of which, when ascertained, the court is asked to deduct from the indebtedness, in order to arrive at the balance, for which balance alone the creditor seeks to be admitted to share in the distribution of the assets. In *re Bigelow et al.*, 1 B. R. 632; s. c. 2 Ben. 480; s. c. 1 L. T. B. 95.

The proof of a claim by a secured creditor differs from that of an unsecured creditor in this: the latter at once steps into the column of general creditors who are to be paid out of the assets of the bankrupt pro rata, according to the amount of their claims; while the former, or secured creditor, halts awhile to have the value of his security determined in such manner as the court may direct, and then becomes a general creditor, or shares in the bankrupt's assets for the balance, after deducting the value of his securities. *In re Bridgman*, 1 B. R. 312; s. c. 2 B. R. 252.

The proof of a secured claim, according to Form No. 21, does not invalidate the right of the creditor to the securities which he is found to hold. *In re Bigelow et al.*, 1 B. R. 632; s. c. 2 Ben. 480; s. c. 1 L. T. B. 95; *in re J. M. Snedaker*, 3 B. R. 629; *King v. Bowman*, 24 La. An. 506.

A collateral consisting of a policy of insurance upon the life of the bankrupt is not a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon, but, nevertheless, the creditor must credit the present value of the security on the debt. The present value of the policy is its cash surrender value, and the creditor is entitled to prove for the balance after deducting this amount from his debt. *In re Frank Newland*, 7 B. R. 477; s. c. 6 Ben. 342.

If a secured creditor also has an unsecured claim, he may prove such claim, and vote for an assignee. *In re S. Hanna*, 7 B. R. 502; s. c. 5 Ben. 5; *in re J. F. & C. R. Parkes*, 10 B. R. 82.

An estimate of the value of the securities made by the secured creditor is not sufficient for the purpose of adjusting the amount on which he may be admitted to vote for assignee. The ascertainment of such value must rest in abeyance until after the election of an assignee. *In re S. Hanna*, 7 B. R. 502; s. c. 5 Ben. 5.

The claim of a creditor who has sold his collaterals can not be rejected absolutely, but may be allowed for such amount as may be found to be actually due. *In re Nounnan & Co.*, 6 B. R. 579; s. c. 1 Utah Ter. 44; s. c. 4 L. T. B. 228.

The holder of a promissory note, the indorser of which is secured by a mortgage upon the property of the bankrupt, may release and surrender his security, and then prove his debt as wholly unsecured. This may be done by a direct and formal release, or by such acts as, either in law or equity, are equivalent to such express release. As the beneficiary of the trust, created or implied for his sole benefit, he can release and discharge the trust, the trustee, and the trust property, without the aid or intervention of a trustee having no interest in the continuance of the trust; and as such release and discharge, without the consent of the surety, must release and discharge the surety, at least to the extent of the full value of the trust property released, the surety has no interest in opposition to the release. *In re Jaycox & Green*, 8 B. R. 241; s. c. 7 B. R. 303.

**Effect of Proving Secured Claim as Unsecured.**—A secured creditor who proves his claim without reference to his lien or security, and without apprising the bankruptcy court of its existence, thereby waives his lien, and relinquishes it to the assignee. *Stewart v. Isidor*, 1 B. R.

485; s. c. 5 Abb. Pr. (N. S.) 66; in re Bloss, 4 B. R. 147; s. c. 2 L. T. B. 126; in re Stansell, 6 B. R. 183; in re Granger & Sabin, 8 B. R. 30; in re Jaycox & Green, 8 B. R. 241; Hoadley v. Cawood, 40 Ind. 239; Briggs v. Stephens, 7 Law Rep. 281.

A secured creditor, who in his proof claims a lien upon the entire estate of the bankrupt, when he only has a lien upon a certain portion thereof, does not thereby lose the real lien to which he is entitled, nor is his proof vitiated. *McKinsey v. Harding*, 4 B. R. 39.

The proof without a release or conveyance is contrary to law, but does not of itself operate to discharge a mortgage. It may prevent the creditor from setting up a mortgage against the assignee, but the assignee alone can avail himself of the rights which this provision is intended to secure. Third parties can derive no right or advantage therefrom. *Cook v. Farrington*, 104 Mass. 212.

There is no provision in the bankruptcy act that the claim of a proving creditor against joint debtors with, or sureties for, the bankrupt, shall be assigned or given up by the creditor to the assignee. Indeed, such provision would be manifestly absurd. The claim of the creditor against the surety of the bankrupt is, in no sense, the property of the bankrupt. The bankrupt has no right or interest in it, and, consequently, can transfer none to his assignee. A creditor who has proved a claim against the bankrupt's estate, arising from a contract made by the bankrupt and certain others, as joint contractors, without stating in his proof that the same was in any manner secured, may, nevertheless, maintain an action upon such contract against the other joint contractors. *Hoyt v. Freel*, 4 B. R. 131; s. c. 7 Abb. Pr. (N. S.) 220; s. c. 2 L. T. B. 144.

Before a secured creditor can prove his full claim as an unsecured debt, he must surrender his security. Such a proof should not be received until a release or conveyance is filed. *In re Brand*, 3 B. R. 324; s. c. 2 L. T. B. 66; *Hatch v. Seely*, 13 B. R. 380; s. c. 37 Iowa, 493.

But where a release has not been made, and the title to the property comes in question in a controversy between the assignee and other parties, that will be considered as having been done which ought to have been done. *Wallace v. Conrad*, 3 B. R. 41; s. c. 3 Brewst. 329; s. c. 7 Phila. 114.

If an indorser takes a mortgage from the maker to secure the payment of all notes indorsed by him and to indemnify him against his indorsements for the maker, and the creditor is not a party to the transaction, it is optional with the creditor to seek and take the benefit of any trust or equitable lien which the law may give him, or to waive such right and rest content with the personal responsibility of the indorser. He can not be coerced to avail himself of the security. If the maker, therefore, becomes bankrupt, the holder does not lose his right of action against the indorser by proving the debt as unsecured. *Merchants' Nat'l. Bank v. Comstock*, 11 B. R. 235; s. c. 55 N. Y. 24.

If the holder of a note, the indorser whereof is protected by a mortgage, proves his claim as unsecured, this does not extinguish the mortgage,

for the assignee is subrogated to the rights of the holder. *Hiscock v. Green*, 12 B. R. 507.

It will not be presumed that a creditor fraudulently concealed the fact of his lien in proving his claim. *Hatch v. Seely*, 13 B. R. 380; s. c. 37 Iowa, 493.

Merely proving a secured claim as a general claim does not waive the security. *Ibid*.

**Amendment of Proof.**—Proofs of debt can not be taken from the file. In re Loweree, 1 B. R. 74; s. c. 1 Ben. 406; in re McIntosh, 2 B. R. 506; in re Emison, 2 B. R. 595. Contra, *Morse v. Lowell*, 48 Mass. 152.

A secured creditor, who inadvertently proves his debt as an unsecured claim, will not be required to surrender his lien and participate in the general distribution of assets, but will be allowed, if he elects to do so, to withdraw or amend the proof, and rely upon his security. In re Brand, 3 B. R. 324; s. c. 2 L. T. B. 66. See Rule I; in re Clark & Binninger, 5 B. R. 255; in re Hope Mining Co., 1 Saw. 710; in re Harwood, Crabbe, 496; in re Lapsley, 1 Penn. L. J. 245.

Participating in the election of an assignee will not preclude a creditor from amending his proof from unsecured to secured, when there is no evidence that he gained any advantage thereby, or that the other creditors have been in any wise prejudiced in consequence of it, or that he was influenced by any fraudulent intent. In the absence of evidence, the presumption is that none existed. In re William McConnell, 9 B. R. 387; s. c. 31 Leg. Int. 61; *King v. Bowman*, 24 La. An. 506; in re J. F. & C. R. Parkes, 10 B. R. 82.

If the secured creditor has received a dividend, he may be allowed to amend, upon condition that he refunds the dividend, with interest. In re J. F. & C. R. Parkes, 10 B. R. 82.

Where a creditor has been guilty of laches in claiming his security, the court may, as a condition for allowing an amendment, require that there shall be a deduction from the proceeds realized by selling the security, of a portion of the costs and expenses of the proceedings. In re William McConnell, 9 B. R. 387; s. c. 31 Leg. Int. 61.

Where proof has been made under a mistake of fact, or even of law, it may be corrected, almost as a matter of course, if neither the bankrupt nor other creditors who have proved will be injured. Even where the rights of others will be affected, if the only effect is to restore all parties to the position they were in before the debt was proved, it would be proper to allow the withdrawal, if there has been a mistake and no want of diligence. The proof may be withdrawn for the purpose of proceeding against a dormant partner of the bankrupt. In re Edward Hubbard, 1 B. R. 679; s. c. Lowell, 190.

An order allowing a withdrawal of a proof may be passed by the register, if, after due notice, no opposition is made; otherwise, by the court. *Ibid*.

Where a proof is sworn to and filed, and afterward, upon the objection of other creditors, is postponed, the creditor has no right to withdraw it upon his mere demand. In re Abraham Halle, 7 Ben. 182.

A creditor will not be allowed to withdraw a proof merely for the purpose of continuing an arrest of the bankrupt, which was made before the commencement of the proceedings in bankruptcy. *In re Wiener*, 14 B. R. 218.

The power of the court to allow a creditor to withdraw a proof that has been filed inadvertently, is wholly discretionary. *Ibid*.

It is the policy and purpose of the act to do equal and exact justice between the estate of the bankrupt and creditors. The court has ample power to investigate a claim at any stage of the proceedings, and to make any correction equity and justice demand, not only to reduce the amount if it is too large, but also to increase it if, through inadvertence, it is smaller than by right it should be. Questions of amendment address themselves to the equitable consideration of the court, and great discretion is exercised in disposing of them. *In re Henry B. Montgomery*, 2 B. R. 429; s. c. 3 Ben. 565.

A creditor can not authorize an attorney to alter a proof without having it sworn to again after such alteration. *In re Pius Walther et al.*, 14 B. R. 273.

So long as the right to prove continues, the right to amend a proof filed should not be denied. *In re Myrick*, 3 B. R. 154; *in re Henry B. Montgomery*, 3 B. R. 429; s. c. 3 Ben. 565.

When the proof is defective, a party may be allowed, and ought to be required to amend it. *In re Loweree*, 1 B. R. 74; s. c. 1 Ben. 406; *in re Myrick*, 3 B. R. 154.

The register has the right, and it is his duty, to permit and require a defective proof to be amended; but if, in such case, an issue of law or fact is raised, he must adjourn the same into court for decision. *In re Elder*, 3 B. R. 670; s. c. 1 Saw. 73; 1 L. T. B. 198; 3 L. T. B. 140.

When the amendment sought relates to a new and different claim from any one of those embraced in the existing proof of debt, leave to amend the existing proof must be denied. The proper course is for the creditor to prove his newly-discovered debt independently. *In re Henry B. Montgomery*, 3 B. R. 429; s. c. 3 Ben. 565. 7 C. 9337

An amendment of a proof relates back to the original filing unless the rights of others have in the meantime intervened, and an objection that a note was not attached to the original proof, or that the claim was barred at the time of the filing of the objection, can not be maintained. *In re J. W. Maybin*, 15 B. R. 468. 7 C. 9337

ACT OF 1867, § 5078. Such oath shall be made by the claimant, testifying of his own knowledge, unless he is absent from the United States, or prevented by some other good cause from testifying, in which case the demand may be verified by the attorney or authorized agent of the claimant testifying to the best of his knowledge, information and belief, and setting forth his means of knowledge. Corporations may verify their claims by the oath of their president,

on all cases, 7 C. 9337



cashier, or treasurer. The court may require or receive further pertinent evidence either for or against the admission of any claim.

Statute revised — March 2, 1867, ch. 176, § 22, 14 Stat. 527. Prior Statute — Aug. 10, 1841, ch. 9, § 5, 5 Stat. 444.

In the proof of debts by a creditor firm composed of several members, the firm is to be treated as one creditor, and any one member may act for all in proving the debts. In *re Joseph Barrett*, 2 B. R. 533; s. c. 1 L. T. B. 144; s. c. 1 C. L. N. 202.

A receiver appointed in one State may file a proof of claim in the district court in another State. Any person who is authorized to give an acquittance of a debt is entitled to prove the debt in bankruptcy, if he be acting in a representative capacity as trustee, assignee, receiver, executor, administrator or in any other of the various representative capacities which the law provides for the administration of human affairs. In *re Republic Ins. Co.*, 8 B. R. 197; s. c. 3 Biss. 504.

A deposition by an assignee for value, before bankruptcy, of a chose in action, is sufficient to entitle him to be considered the creditor in respect to such debt, to all intents and for all purposes. His deposition should show the facts and the date of the transfer, and the name of the original creditor. It is not necessary that the assignor should join in making the deposition. Such assignee of a chose in action, so proving, should have the right to take any such action or proceeding in the cause in the name of his assignor, at his own expense, as he may be advised. An appeal from the disallowance of such a claim ought, perhaps, to be taken in the name of the original creditor. In *re Fortune*, 3 B. R. 312; s. c. Lowell, 384; s. c. 2 L. T. B. 99.

A party to whom a debt has been assigned after the commencement of proceedings in bankruptcy, may prove it. It is true that the Forms require that the debt shall be due to the creditor at the time of the commencement of proceedings in bankruptcy, but these may be modified to suit the facts of each particular case. Taken literally, they would exclude administrators, or other assignees, by mere operation of law, which certainly can not have been intended. There is nothing in this section to avoid a real and honest transfer without any purpose of influencing the proceedings in bankruptcy, but rather an implication that it may be done if there is no such purpose. In *re Murdock*, 3 B. R. 146; s. c. Lowell, 362; s. c. 2 L. T. B. 97; in *re Frank*, 5 B. R. 194; s. c. 5 Ben. 164; s. c. 2 L. T. B. 188.

If the holder of a negotiable note indorses it after the bankruptcy of the maker, the indorsee may prove the debt. *Humphreys v. Blight*, 4 Dall. 370; s. c. 1 Wash. 44.

A party who in good faith undertakes to buy up all the claims against the bankrupt, with the intention of stopping the proceedings and giving the debtor time to pay them, does not violate any of the provisions of the bankruptcy act. The bankruptcy act should not be construed so strictly as to prevent the bankrupt from making efforts to extricate himself from the bankruptcy proceedings, and if he can find a friend to buy up his



debts, for the purpose of giving him time to convert his property into money to pay them, he may do so. The bankruptcy act encourages all honest efforts, and sustains all honest transactions of a debtor. The clause which provides that the creditor must prove that the claim was not procured for the purpose of influencing the proceedings under this act, does not relate to transfers after the filing of the petition any more than before, and is not intended to interfere with ordinary transfers, but only of notes and demands, such transfers as are procured for the purpose of influencing the proceedings in bankruptcy. If the person who honestly undertakes to purchase up the debts, fails, he may prove the claim and participate in the estate. *In re Strachan*, 3 Biss. 181; *in re Pease et al.*, 6 B. R. 173.

There must be an assignment of the claim. A receipt of payment is not sufficient. If the claimant has paid the claim, he may have a demand for money paid against the bankrupt, but, when such payment is made after the filing of the petition, the demand is not a provable debt. *In re Strachan*, 3 Biss. 181.

The true mode of proving an assigned claim, is that the holder should himself make the affidavit, else, the statement that the claim was not procured, etc., becomes merely illusory, for it is not made by the party who has bought the claim, and might be entirely true in respect to the affiant, and false as to the real party in interest. *In re Pease et al.*, 6 B. R. 173.

An agent can not make oath in the deposition in proof of his principal's debt, without showing that the creditor is absent from the United States, or prevented by some other good cause from testifying. This cause is to be proved to the satisfaction of the judge or register before whom the debt is offered for proof. The law requires the oath of some person having knowledge, and the creditor himself is presumed to have it, and unless he is absent, or in some way prevented from testifying, no one can do so for him, unless he is a person having actual knowledge. *In re H. F. Barnes, Lowell*, 560.

If one partner is sick and the other is out of the State, this is not a sufficient reason for allowing an agent to make the proof, although his knowledge is superior to that of the absent partner. *In re William Whyte*, 9 B. R. 267.

If an agent has personal knowledge of all the facts necessary to make proof of it, and the creditor has no knowledge of the matter at all, the former may prove the debt. *In re Martin Watrous et al.*, 14 B. R. 258.

An agent holding negotiable paper can not prove it when the owner is in a situation to make the proof himself. *In re W. A. Saunders*, 13 B. R. 164.

Mere absence from the State or the locality where the proof is made, is not alone regarded as cause for proof by an agent. *In re George Jackson et al.*, 14 B. R. 449.

If the creditor is confined to his house by sickness, so that he is unable to testify, this is a sufficient reason for allowing an agent to make the proof. *In re William Whyte*, 9 B. R. 267.

When an agent testifies positively of his own knowledge, the proof need not show any reason why the creditor himself could not have made the

deposition, nor need he testify to the best of his knowledge, information and belief, nor set forth his means of knowledge as to the claim. *McKinsey v. Harding*, 4 B. R. 39.

A person who has acted as the agent of the bankrupt in purchasing claims against the bankrupt's estate, can not prove them. *In re Lathrop et al.*, 3 B. R. 413; s. c. 3 Ben. 490.

A creditor who makes the proper deposition, but retains the proof in his own hands, can not be considered a creditor who has proved his debt within the technical meaning of the bankruptcy act. *In re L. Sheppard*, 1 B. R. 439; s. c. 1 L. T. B. 49; s. c. 7 A. L. Reg. 484.

A bankrupt may testify to support a claim of his wife against the estate, where such testimony would be competent under the State laws. *In re Levi Bean*, 14 B. R. 182; s. c. 1 W. N. 432.

The proof of a claim by a State should be made by the State treasurer or by some officer holding a relation to the State similar to the relation which a president, cashier or treasurer bears to a corporation of which he is such officer. A warden can not make the proof. *In re Corn Exchange Bank*, 15 B. R. 216; s. c. 9 C. L. N. 254, 431.

ACT OF 1867, § 5079. Such oath may be taken in any district before any register or any commissioner of the circuit court authorized to administer oaths; or, if the creditor is in a foreign country, before any minister, consul, or vice-consul of the United States. When the proof is so made it shall be delivered or sent by mail to the register having charge of the case.

Statute revised — March 2, 1867, ch. 176, § 22, 14 Stat. 527; July 27, 1868, ch. 258, § 3, 15 Stat. 228.

A proof can not be taken before a consular agent. *In re Robert V. Lynch*, 16 B. R. 38.

ACT OF 1867, § 5080. If the proof is satisfactory to the register it shall be delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time of receipt of such proof, and the amount and nature of the debts. Such books shall be open to the inspection of all the creditors. The court may require or receive further pertinent evidence either for or against the admission of any claim.

Statute revised — March 2, 1867, ch. 176, § 22, 14 Stat. 527.

The officer taking the proof, should append it to a certificate, that it is satisfactory to him. *In re Belden & Hooker*, 4 B. R. 194.

The register who has charge of the proceedings in bankruptcy, may reject a proof taken before another register, when the same does not appear to be in conformity to law, but if an issue of law or of fact is raised and contested thereon, the question must be adjourned into court for the decision of the judge. Proofs so rejected should be returned for amendment. *In re Benj. H. Loder*, 3 B. R. 665; s. c. 4 Ben. 125.

The register has the power to pass upon the satisfactory or unsatisfactory character of a proof, but the power is to be exercised in subordination to the provision of section 5009, which requires that an issue of law or fact raised, and contested by a party to the proceedings before the register, shall be adjourned into court for a decision. *In re Bogert & Evans*, 2 B. R. 435; s. c. 38 How. Pr. 111.

A register, in examining proofs of debt for admission, acts not only as a judicial officer who is to decide all the questions arising in the discharge of his duty according to law, but sitting also as an administrative officer in the interest and service of all the creditors, he is to take care that defective and insufficient proofs are not allowed to pass, through partiality, to any creditor, or inattention which would produce all the mischievous effects of partiality. *In re Port Huron Dry Dock Co.*, 14 B. R. 253.

A claim may be said to be duly proved, when the statements of the deponent, if true, establish *prima facie* the existence of the debt, and the present right of the creditor to payment of the same out of the estate of the bankrupt. But a claim is not duly proven when any allegation which the act requires to be made in the proof concerning it is omitted, or where the proof is not made in conformity with the forms prescribed, and the rules and practice of the court. *In re Walton et al.*, 1 Deady, 510.

The formal proof of the debt is *prima facie* sufficient. It is always a question of fact whether the debt has been paid or secured in whole or in part, or whether it is provable, and a question as to which pertinent evidence is always admissible. But the *prima facie* case is made out by the affidavit of the creditor. *In re Colman*, 2 B. R. 563; *in re Fortune*, 3 B. R. 312; s. c. 2 L. T. B. 99.

The creditor is a competent witness to establish his claim, although the bankrupt died before it was offered for proof. *In re E. C. Merrill*, 16 B. R. 35.

Quære, Can a creditor who has omitted to take his appeal from the rejection of his proof within the prescribed time, set up the rejected claim in any other action? *Catlin v. Foster*, 3 B. R. 540; s. c. 1 Saw. 37; s. c. 1 L. T. B. 192.

All proofs of debts are to be sent to the assignee for him to report them as required in this section. When the assignee has completed his lists, he must return them to the register, and they must, under Rule VII, be filed in the clerk's office with the papers in the case. *Anon.*, 1 B. R. 219; 2 B. R. 68; *in re L. Sheppard*, 1 B. R. 439; s. c. 1 L. T. B. 49; s. c. 7 A. L. Reg. 484.

A creditor may prosecute an action against a surety before a final distribution, although he has proved the note against the principal. *Gregg v. Wilson*, 15 B. R. 142; s. c. 50 Ind. 490.

If a treasurer of a bank fraudulently gives a certificate in his own name to a depositor, instead of in the name of the bank, the latter is bound to be prompt in disaffirming the contract, and demanding his money or a certificate in proper form to bind the bank, and can not do so after he has proved his claim against the treasurer, and received a dividend thereon. *Shields v. Niagara Bank*, 10 N. Y. Supr. 477; s. c. 5 T. & C. 585.

A certificate of deposit, after the bankruptcy of the maker, is dishonored paper, and after it is proved and filed, has no longer the qualities of negotiable paper. The claim is transferable neither by delivery nor indorsement; it may still be assigned, but not delivered or taken from the files. A purchaser of the claim takes it subject to all equities that exist against his vendor. *In re John Sime & Co.*, 12 B. R. 315.

The proof of a judgment does not operate to release a sheriff from liability for relinquishing his levy, and surrendering the property to the marshal. *Ansonia B. & C. Co. v. Babbitt*, 15 N. Y. Supr. 157.

In an action for misrepresentation in regard to the credit of another, the plaintiff may give evidence to establish the bankruptcy of such person and the proof of a claim against him by the defendant. *Stafford v. Grout*, 120 Mass. 20.

ACT OF 1898, CH. 3, § 7. **Rejection of Claims; Duties of Bankrupts.**—(a) The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; \* \* \* (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

ACT OF 1898, CH. 6, § 57. \* \* \* **Objections to Claims.**—(f) Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

(g) The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.  
\* \* \*

(k) Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

(1) Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole or the proportional part thereof if rejected only in part.

Bankruptcy law does not prescribe any rule or furnish any method for ascertaining the character of distributable assets. That is a subject of preliminary judicial inquiry to be determined by legal principles of recognized controlling applicability. In *re Zug*, 16 B. R. 280.

Where bankrupt collects moneys belonging to his estate, either before or after the filing of the petition in bankruptcy, and fails to account for the same, he will be compelled to pay such moneys to the assignee, and such proceedings may be instituted by summary process. In *re Ettinger*, 18 B. R. 222.

Payment of such moneys, after filing of petition for interest on mortgages, will not be allowed unless shown to be for benefit of the estate. *Ibid.*

Where bankrupt has been ordered to submit himself to further examination, a departure from the district before the time appointed, without examination, is such a violation of the order that no discharge (under law of 1867) would be granted until it is rectified by submitting himself to such examination. In *re Kingsley*, 16 B. R. 301.

A creditor who has received a preference contrary to provisions of the law can not prove his debt after the preference has been recovered from him by assignee. In *re Stein*, 16 B. R. 569.

Insolvents made assignment of all their partnership property to their largest creditor, upon which they were adjudicated bankrupt. At first meeting of creditors, this creditor having sold out the partnership goods, and collected its notes and accounts in part, appeared before the register and offered to surrender to him a roll of uncounted bills, as the net proceeds of the fraudulent preference, to prove his debt, and vote for assignee. Held, that the surrender of a fraudulent preference can only be made to the assignee, and pending his appointment and qualification the proof of the debt must be postponed, and the offer of the preferred creditor to vote for assignee is to be denied. In *re Parham & Dunn*, 17 B. R. 300.

After recovery against the preferred creditor by the assignee the creditor may prove his debt, if he has not actively assisted in the fraud. See In *re Stein*, 16 B. R. 569; In *re Black, Currier & Osgood*, 17 B. R. 399.

Assignee recovered a judgment for value of goods taken by him prior to the bankruptcy, in payment of his indebtedness. The creditor paid the amount of such judgment and costs, and proved his debt in the bankruptcy proceeding. On motion to expunge the claim; Held, that such payment was a surrender of his preference, and that, in absence of actual fraud, the creditor had a right to prove his claim. In *re Newcomer*, 18 B. R. 85.

ACT OF 1867, § 5081. The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any

application, examine upon oath the bankrupt, or any person tendering or who has made proof of a claim, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake.

Statute revised — March 2, 1867, ch. 176, § 22, 14 Stat. 527. Prior Statutes — April 4, 1800, ch. 19, § 16, 2 Stat. 26; Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

Under this clause the court has at all times full control of all proofs of debts, and the right to entertain objections to the validity of the debts or the proofs thereof. In *re Patterson*, 1 B. R. 100; s. c. 1 Ben. 448; in *re Decatur Jones*, 2 B. R. 59.

The objection to the proof of a claim must be by a written allegation specifying, with reasonable certainty and brevity, the grounds of such objection. In *re Walton et al.*, 1 Deady. 442.

The creditor stands before the court in the attitude of a plaintiff invoking its jurisdiction, and ample provision is made for adjudication and determination of his claim in a court of law and by a jury, of which he may avail himself by taking an appeal to the circuit court. In *re Paddock*, 6 B. R. 132; s. c. 2 L. T. B. 214.

The claim of the petitioning creditor is open to contention. His debt must be established. The mere fact that he is a petitioner is not conclusive upon other creditors that he is to be allowed in the distribution of the estate just what he claims in his petition, nor is it conclusive upon the assignee. If this were not so, collusion between a debtor and a petitioner setting up a pretended but fictitious claim would work the grossest injustice. In *re Cornwall*, 6 B. R. 305; s. c. 9 Blatch. 114.

A creditor may intervene and contest the allowance of the claim of any other creditor. In *re Adolph Joseph*, 2 Woods, 390.

Any creditor has the right to serve a notice on the register, protesting against the proof of any claims by certain persons, and requesting that he may be notified if such persons should tender their claims for proof. In *re J. O. Smith*, 1 B. R. 243; s. c. 2 Ben. 113.

Persons who are not creditors can not question the right of another to prove a claim. That right must be questioned otherwise. In *re Lathrop et al.*, 3 B. R. 413; s. c. 3 Ben. 490.

The court alone has the power to pass an order requiring a creditor to show cause why proof should not be vacated and annulled. The register can not make such an order. *Comstock v. Wheeler*, 2 B. R. 561; s. c. 3 Ben. 236.

The court may make an examination of a creditor without any application therefor, and when it sees, from the testimony before it, that certain claims are improperly proved, it will reject them. In *re Lathrop et al.*, 3 B. R. 413; s. c. 3 Ben. 490.

A creditor who does not reside in the judicial district in which the court of bankruptcy sits, may be required by an order duly served upon him to attend and be examined in regard to his debt. A creditor who has proved his debt becomes subject to the jurisdiction of the court without regard to his place of residence, and is bound to obey all the orders of the court touching his alleged debt. In case of his disobedience of its orders, the court can deprive him of all the benefits of the bankruptcy act given to creditors, and can reject and expunge his claims. In case it shall be made to appear that any creditor whose debt is contested can not personally attend, to be examined in the district where proceedings are pending, without hardship to him, owing to the distance of his residence, or other similar reasons, the court will provide by order for the taking of his examination before a register of the district in which he resides. In *re* Kyler, 2 Ben. 414.

Where the assignee appears under an order of reference procured on the petition of a creditor alleging that he and the assignee object to a certain claim, and states that he is satisfied with the proof filed with him since his election, no further proceedings should be taken under the reference. In *re* Theodore E. Baldwin, 6 Ben. 196.

The words "any creditor" must be held to mean not only a creditor who has proved a debt, but a creditor who has tendered proof of a debt which has not yet been allowed. In *re* Ray, 1 B. R. 203; s. c. 2 Ben. 53.

A note given by the bankrupt for more than was actually due, in pursuance of a combination between the bankrupt and the creditor for the purpose of enlarging the creditor's dividend, is illegal, and this illegality of a portion of the consideration makes the whole note void and unavailable, so far at least as the interests of creditors are concerned. In *re* Elder, 3 B. R. 670; s. c. 1 Saw. 73; s. c. 1 L. T. B. 198; s. c. 3 L. T. B. 140.

In a proper case, a claim may be allowed in part, or allowed or disallowed as a whole. But when a creditor, by a combination with the bankrupt, and in view of the commencement of proceedings in bankruptcy, fraudulently enlarges his claim by taking fictitious notes, both the real and fictitious claims will be disallowed. Fraud corrupts and destroys the whole debt. Every party to proceedings under a bankruptcy law must be held to the utmost good faith; and he who attempts a fraud can not, if discovered, complain when he is made to abide by the legal consequences of his act. *Ibid*.

A claim which has its origin in a transaction entered into by the claimant with the bankrupt, for the purpose of delaying, hindering, or defrauding the creditors of the latter, is not provable. In *re* E. R. Stephens, 6 B. R. 533; s. c. 3 Biss. 387.

A claim which is valid independently of a fraudulent transfer, is not merged thereby. When the transfer is set aside, the claim is revived, and may be proved. *Ibid*.

Claims which are purchased by an agent of the bankrupt are illegal, and must be rejected. In *re* Lathrop et al., 3 B. R. 413; s. c. 3 Ben. 490; s. c. 5 B. R. 43; s. c. 5 Ben. 190.



If a creditor who has advanced a certain sum to a member of a firm to be put into the business as capital, subsequently takes a note of the firm therefor, and falsely claims that it as well as other sums were advanced to the firm, he forfeits his right to prove for his real advances. *Marratt v. Atterbury*, 11 B. R. 225; s. c. 3 Dillon, 444.

A proof of a judgment which is subsequently set aside should be expunged. In *re Cosmore G. Bruce*, 6 Ben. 515.

If a party who took a bill of sale as security deliberately proves a debt which assumes that he is the absolute owner of the goods, and persists in such false claim in an action by the assignee to recover the goods, and attempts to support it by his own oath, he is estopped from claiming them as security. *Willis v. Carpenter et al.*, 14 B. R. 521.

After the claims of all bona fide creditors and all the expenses have been paid, the money expended by the agents of the bankrupts may be refunded to them. When the purchase has been made by one partner, his copartner must share the burden, if he desires the benefit. The balance will not be turned over to the bankrupts without providing for such money so used in the purchase of the claims. In *re Lathrop et al.*, 5 B. R. 43; s. c. 5 Ben. 199.

The prohibition of the allowance of a claim founded in illegality is only in affirmance of the common law. What is or is not an illegal transaction depends upon the law of the place where the contract was made or the transaction had. In *re Robert Pittock*, 8 B. R. 78; s. c. 2 Saw. 416.

If a mortgage is merely constructively fraudulent, the mortgagee may prove for his actual advances when the mortgage is set aside. *Kappner v. St. Louis & St. J. R. R. Co.*, 3 Dillon, 228.

It is not competent for the district court to go behind the judgment of a State court and inquire into the consideration of the debt upon which the judgment is founded. A judgment rendered upon a usurious contract can not be set aside by the court of bankruptcy. If insanity or any matter of fact constitutes the ground on which a review of the judgment is sought, the proper remedy is by a writ of error coram nobis in the court wherein the judgment was rendered. *McKinsey v. Harding*, 4 B. R. 39.

Creditors whose interests are affected by a judgment against their debtor, may avoid it collaterally, because they have no right to have it reviewed directly. In bankruptcy, the creditors are interested in contesting a judgment which is offered for proof in competition with their own debts, and may show, by any appropriate evidence, that the judgment is void or voidable for fraud or irregularity. A debtor might suffer judgment against him for the very purpose of affecting the proceedings in bankruptcy, or a judgment may be obtained for a just debt, but under circumstances which would make it a fraudulent preference. In all such cases it must be open to other creditors to object to the judgment when offered for proof against the assets. On the other hand, where the court rendering the judgment has jurisdiction, and there has been no fraud and no preference, no one can examine into the consideration of a judgment, and show by evidence outside of the record that the judgment ought not to have been rendered, or not for so large a sum. While the debtor is



not bankrupt, nor acting in contemplation of bankruptcy, he binds all the world by his acts and omissions in relation to his own affairs, and if he does not choose to defend an action to which he has a legal defense, and of which he has had full notice, his estate will be committed by his act or neglect, just as it would be by any improvident bargain he might make, or by any new promise to pay a debt barred by the lapse of time or a former discharge in bankruptcy. When, therefore, the judgment is either void or voidable as of right, by the debtor or by creditors, it may be examined into when offered for proof. Where it is valid against the debtor, and no fraud on creditors is shown, it is valid for the purpose of proof. If there is an intermediate case in which it would be discretionary with the court which rendered the judgment to vacate it upon the ground of mistake, the assignee might be allowed to pursue that remedy, the proof in the meantime being postponed. *Ex parte O'Neil*, 1 B. R. 677; s. c. *Lowell*, 163; in *re James H. Dunn*, 11 B. R. 270.

Evidence is not admissible to impeach a judgment merely on the ground of an excessive assessment of damages. *Ex parte O'Neil*, 1 B. R. 677; s. c. *Lowell*, 163.

Under section 4998 and Rule V, the register has the power to take the evidence required by this clause. When a question is raised as to the validity of a claim tendered for proof, and evidence is offered in regard to it, the register ought to investigate the question so raised, and not allow the claim merely because the creditor swears to it. In *re Orne*, 1 B. R. 57; s. c. 1 Ben. 361.

The register has no power to set on foot the inquiry provided for in this section, except for the purpose of ascertaining whether or not a claim shall be postponed. In *re Herman et al.*, 3 B. R. 618; s. c. 4 Ben. 126.

When the question of due proof or not comes up before the court upon the application of creditors to have the claim rejected, if the evidence taken before the court shows the consideration to be legal and sufficient, the claim will not be rejected. If defects in the deposition have justified the application, costs can be imposed upon the party in fault. In *re Elder*, 3 B. R. 670; s. c. 1 Saw. 73; s. c. 1 L. T. B. 196; s. c. 3 L. T. B. 140.

When a creditor presents his claim for proof, he at once subjects himself and his claim to the power and jurisdiction of the court, and both thereby become subject to the orders of the court under and within the provisions of the bankruptcy act. When he is examined in respect to his claim, he is examined as a party to the proceedings, and is in no sense a witness in the sense in which that word is used in the act of Congress allowing fees to witnesses. A claim for fees will, therefore, be disallowed. In *re S. Paddock*, 6 B. R. 132; s. c. 2 L. T. B. 214; in *re Kyler*, 2 Ben. 414.

When the claim of a creditor, who has proved his debt without surrendering his collaterals, is stricken out as illegal and void on account of usury, the court will not also compel him to surrender the collaterals. *Dallas v. Flues & Co.*, 8 Phila. 150.

The decree of the district court in expunging a proof is in the nature of a judgment binding upon all the parties to it, and prevents a subsequent prosecution of the claim in a State court. *Pease v. Bennett*, 17 N. H. 124.

ACT OF 1898, CH. 6, § 57. \* \* \* **Withdrawal of Original Claim.**— (b) Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

ACT OF 1867, § 5082. A bill of exchange, promissory note, or other instrument used in evidence upon the proof of a claim, and left in court or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall indorse upon it the name of the party against whose estate it has been proved, and the date and amount of any dividend declared thereon.

Statute revised — March 2, 1867, ch. 176, § 24, 14 Stat. 528.

The instrument proven may be withdrawn, in pursuance of the provisions of this section. In re Emison, 2 B. R. 505.

The court may, upon cause shown, order the withdrawal of exhibits filed in a cause, but it will not order or allow them to be withdrawn, except upon the application of some person having an interest in them, who can show the proper use for which he desires them. In re McNair, 2 B. R. 219, 341.

ACT OF 1898, CH. 6, § 57. \* \* \* **Objections Heard, When.**— (f) Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

ACT OF 1867, § 5083. When a claim is presented for proof before the election of the assignee, and the judge or register entertains doubts of its validity or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen.

Statute revised — March 2, 1867, ch. 176, § 23, 14 Stat. 528.

Act of 1898, ch. 6, § 57, f. g., ante, p. 542.

The purport of this section is that it is the duty of a register, when he entertains a doubt of the validity of a claim, or of the right of a creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, to postpone the proof of a claim until the assignee is chosen. In re Orue, 1 B. R. 57; s. c. 1 Ben. 361; in re Herman

et al., 3 B. R. 618; s. c. 4 Ben. 126; in re Noble, 3 B. R. 96; s. c. 3 Ben. 332; in re Bartusch, 9 B. R. 478; in re Jacoby, 1 W. N. 15.

The claim may be postponed, although the deposition for the proof thereof has been produced to, and filed with, the register. In re Ezra M. Stevens, 4 B. R. 367; s. c. 4 Ben. 513; s. c. 2 L. T. B. 121.

A claim of questionable character, and in dispute, should be postponed. In re Decatur Jones, 2 B. R. 59.

The claim of a creditor who has accepted a preference should be postponed. In re Herman et al., 3 B. R. 618; s. c. 4 Ben. 126; in re Ezra M. Stevens, 4 B. R. 367; s. c. 4 Ben. 513; s. c. 2 L. T. B. 121; in re Walton et al., 1 Dedy, 442.

A creditor who has accepted a conveyance prohibited by the bankruptcy law should not be allowed to prove his debt until an assignee is chosen. In re Chamberlain et al., 3 B. R. 710.

When a conveyance prohibited by the bankruptcy law has been made to a third person, for the benefit of creditors, creditors who had no knowledge whatever of the facts that make up the intent to defeat the bankruptcy act until after the conveyance was executed and delivered and who were not consulted concerning it, and who did not in any way accept of it, except to declare verbally that they were satisfied with it, may prove their claims and participate in the election of an assignee. In no sense can it be said that they received the conveyance. The conveyance was not to them directly or indirectly; it was complete before they had any knowledge of it. *Ibid.*

In order to justify the postponement of a claim until after the election of an assignee, it is not necessary that the register shall be satisfied or have before him positive evidence that the claim is invalid or that the creditor has no right to prove it. In re George Jackson et al., 14 B. R. 449.

In order to postpone a claim, there must be such investigation as will influence the mind to a conclusion as to whether there is such doubt of the validity of the claim or of the creditor's right to prove it. *Ibid.*

Upon facts and circumstances being laid before the register which create in his mind a substantial doubt upon the question of the validity of the creditor's right, it is his duty to postpone the claim for investigation. *Ibid.*

Mere relationship to the bankrupt will not alone justify the postponement of a claim. *Ibid.*

The register can not postpone a claim on mere objections. In re George Jackson et al., 14 B. R. 449; in re Bartusch, 9 B. R. 478.

The doubt in the mind of the register should be a reasonable substantial doubt resulting from a judicial consideration of the question. In re George Jackson et al., 14 B. R. 449.

The proof of a claim which is not stated in items, and does not appear on the schedule, may be postponed. In re Elijah Milwain, 12 B. R. 358; s. c. 9 Pac. L. R. 236.

The register has no right to postpone any claim unless he has suspicion that it is unfounded. Such suspicion can not be entertained judicially unless predicated upon facts which legitimately excite it. If they exist, the creditor should be accorded the opportunity to explain them. A sus-

picion within the statute arises when the claim is not susceptible of a ready and simple explanation. *In re Northern Iron Co.*, 14 B. R. 356.

When a creditor objects to the postponement of his claim, he should have the objection entered and the question certified before any further action transpires before the register. *In re George Jackson et al.*, 14 B. R. 449.

When the power of postponement is erroneously exercised by a register, the creditor may have the judgment of the court on the question. *Ibid.*

The proof of the claim of an officer of a bankrupt corporation, who is also a stockholder, should be postponed when the claim appears suspicious. Such a debt ought to be investigated by an assignee who has been nominated by other creditors. *In re Lake Superior S. C. R. R. & I. Co.*, 7 B. R. 376; *in re Northern Iron Co.*, 14 B. R. 356.

The proof of a claim which has been postponed is to be treated in all respects as if the claim had not been tendered before the election of an assignee and postponed. *In re Herman et al.*, 3 B. R. 649.

ACT OF 1898, CH. 6, § 57. \* \* \* **Preferences Surrendered.**  
—(g) The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.

ACT OF 1867, § 5084. Any person who, since the second day of March, eighteen hundred and sixty-seven, has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provisions of the act of March two, eighteen hundred and sixty-seven, chapter one hundred and seventy-six, to establish a uniform system of bankruptcy, or to any provisions of this Title, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference.

Statute revised — March 2, 1867, ch. 176, § 23, 14 Stat. 528.

Payment of a judgment or decree recovered against a creditor on account of a fraudulent preference, is not a surrender within the meaning of this section. To surrender, clearly implies action on the part of the person receiving the preference. To recover, as clearly implies action against the person receiving the preference. Under this section, it is left to the option of the person receiving the preference, whether he will give up the property he has received by the way of preference, or whether he will hold on to it; the only consequence being that he can not prove his debt or receive any dividend upon it, in case he chooses to pursue the latter course. In case of a recovery he has no such option. From this analysis it clearly appears that the recovery provided for in section 5128 is the alternative of the surrender provided for in this section. But when does this alternative arise, and in what case may it be resorted to?

Clearly in those cases, and those only, in which there is a failure, refusal or neglect to surrender. A surrender may, probably, be made so as to fully answer the requirements of this section at any time before judgment, because the word "recover" is evidently used in its strict legal sense, and, in that sense, the obtaining of a judgment by the assignee in his favor, is the recovery meant. But after the rendition of the judgment there can be no surrender. The recovery is then complete, and anything done after that in satisfaction of the judgment or decree can in no sense be deemed a surrender. In *re Tonkin & Trewartha*, 4 B. R. 52; s. c. 1 L. T. B. 232; s. c. 3 L. T. B. 221; in *re Richter's Estate*, 4 B. R. 221; s. c. 1 Dillon, 544; in *re John F. Lee*, 14 B. R. 80; in *re Cramer*, 13 B. R. 225; s. c. 8 O. L. N. 106.

The provisions of this section must be construed in connection with the clause in section 5021 which prohibits certain creditors from proving their debts, in such a manner that, if possible, both may stand. The construction which attains this end is that the clause in section 5021 applies only to cases in which the assignee is compelled to resort to legal proceedings to recover the property; that the creditor who claims to retain the property makes himself conclusively a party to the fraud by resisting the claim of the assignee to recover the property, in case the assignee is successful; but that, where the creditor avails himself of the *locus poenitentiae*, by voluntarily surrendering the property to the assignee, he ceases to be a party to the fraud, and may prove his debt. In *re O. A. Davidson*, 3 B. R. 418; s. c. 4 Ben. 10; in *re H. B. Montgomery*, 3 B. R. 429; s. c. 3 Ben. 565; in *re Scott & McCarty*, 4 B. R. 414; in *re Hunt & Hornell*, 5 B. R. 433; in *re Reece & Brother*, 2 Bond, 359; in *re E. R. Stephens*, 6 B. R. 533; s. c. 3 Biss. 387; in *re Walton et al.*, 1 Deady, 442; *Coxe v. Hale*, 8 B. R. 562; s. c. 10 Blatch. 56; in *re Clark & Daughtrey*, 10 B. R. 21; in *re Drummond*, 4 Biss. 149. *Contra*, *Bingham v. Richmond*, 6 B. R. 127; *Bingham v. Frost*, 6 B. R. 130.

A claim on account of which a preference has been accepted, would, but for this section, undoubtedly be provable. This section operates to suspend the right until the creditor holding a preferred claim shall first have surrendered to the assignee the preference received by him. When such surrender is made the suspension ceases. The office of this clause, therefore, is in the first instance that of suspension merely, to ripen, however, into absolute prohibition in case of a refusal or neglect to surrender. Upon such surrender being made, the right of such creditor to prove his debt revives, and is in full force the same as if such suspension had never existed. In *re Scott & McCarty*, 4 B. R. 414.

It will not do to say that this clause is to be given effect in voluntary and not in involuntary cases, because that would involve the absurdity of saying that the quality and consequences of the act of the creditor in accepting a preference are to be measured and judged of not by the statute itself, but by what the debtor may see fit subsequently to do. It must be a strong necessity growing out of positive and unmistakable provisions of the law that would induce a court to adopt a construction leading to such unreasonable and inconsistent results. In *re Scott & McCarty*, 4 B. R. 414; in *re E. R. Stephens*, 6 B. R. 533; s. c. 3 Biss. 387.

Where there is nothing but a constructive fraud, and the creditor has acted in good faith and under the conviction that he has a valid right to retain the property, he may do so, and allow a suit to be prosecuted against him and proof to be introduced against him without being deprived of his right to surrender before the actual entry of a judgment. *Burr v. Hopkins*, 12 B. R. 211; s. c. 6 Biss. 345; in *re Joseph Schoenenberger*, 15 B. R. 305.

It makes no difference whether the transfer is constructively fraudulent under the statute of Elizabeth or under the special provisions of the bankruptcy law. *Burr v. Hopkins*, 12 B. R. 211; s. c. 6 Biss. 345.

Until a recovery has been had by judgment or decree, a preferred creditor may surrender, and his right to prove his debt against the bankrupt's estate and to receive dividends therefrom will, by such surrender, be revived and become binding on all concerned, regardless of the question whether a suit shall or shall not have been commenced against him by the assignee and be pending at the time of such surrender. It is immaterial whether there was a demand and refusal before suit was brought. In *re Kipp*, 4 B. R. 593; s. c. 1 L. T. B. 246; s. c. 4 L. T. B. 60; in *re Simeon Leland et al.*, 9 B. R. 209.

Mere possession of the property by the assignee is not a recovery of it unless he obtains such an adjudication as to the preference. In *re Simeon Leland et al.*, 9 B. R. 209.

It is not necessary that there shall be a direct suit by the assignee against the preferred creditor, and a recovery of property from him and out of his possession, in order to constitute the recovery referred to by the statute. An adjudication in any proceeding where the court has jurisdiction over the subject and the parties is sufficient. *Ibid.*

Where the fraud is only constructive and not actual, the creditor should in equity have a reasonable opportunity of considering whether he will surrender his preferences and pay all the costs and charges, but his decision must precede the final decree. The entry of the final decree may be suspended for a brief period to give him such an opportunity. *Hood v. Karper*, 5 B. R. 358; s. c. 8 Phila. 160; s. c. 2 L. T. B. 201; *Zahm v. Fry*, 9 B. R. 546; s. c. 21 Pitts. L. J. 155; s. c. 61 Leg. Int. 197.

It may be a matter of discretion with the court whether a party shall be allowed to surrender after suit brought, and particularly after the testimony is taken, and the party becomes satisfied it is enough to defeat him. The spirit of the act does not warrant a practice of the kind. A party should not be allowed to experiment and speculate upon the ability of the assignee to prove a case against him, and when he sees that he has succeeded, then to plead guilty and make a surrender. Such a practice ought not to be tolerated. A party ought to elect, and having elected will be held to his election. A surrender can not be made after suit brought except under very peculiar circumstances. In *re E. R. Stephens*, 6 B. R. 533; s. c. 3 Biss. 387.

In order to be allowed to prove a debt unlawfully preferred, the party must surrender the unlawful preference wholly, and wipe out the security entirely, even though a part of property is exempt from execution. *Ibid.*

A creditor may, of course, if he chooses, accept a preference. In doing

so, however, he takes the chances of his debtor going into bankruptcy either voluntarily or involuntarily, and thus losing the advantage obtained. In such cases, all he has to do to remove the obstacle to proving his claim in bankruptcy, and his standing on an equal footing with the other creditors, is simply to surrender such advantage to the assignee. In *re Forsyth & Murtha*, 7 B. R. 174.

The creditor contemplated by this clause is a creditor who has received a payment or conveyance giving him a preference. A creditor who is appointed an assignee by a voluntary assignment of the debtor's property for equal distribution *pro rata* among all the creditors of the debtor does not thereby receive a preference, and consequently is not debarred from proving his debt. In *re Joseph H. Horton et al.*, 5 Ben. 562; in *re William M. Lloyd*, 15 B. R. 257; s. c. 24 Pitts. L. J. 113.

If a creditor who has proved his claim as unsecured, afterward unites in a proceeding to assert the validity of a security held by him for the claim without amending his proof, he stands as if he never had filed any proof of debt. The objection that the proof is a surrender of the security is one that the assignee may waive. If the creditor fails to sustain his right to the security, he can not afterward set up his proof to avoid the forfeiture imposed by the statute. In *re Simeon Leland et al.*, 9 B. R. 209.

A mortgage to indemnify the sureties on a bond is not a preference of the principal debt unless the creditor is a party to the transaction. In *re William M. Lloyd*, 15 B. R. 257; s. c. 24 Pitts. L. J. 113.

If the creditor is precluded from proving his claim, on account of receiving a preference and refusing to surrender it, a guarantor can not prove it. In *re C. B. Ayers*, 6 Biss. 48.

The court will not, in a proceeding to recover the preference, enter a decree prohibiting the preferred creditor from proving his debt. *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584.

A creditor who has received a preference may surrender it and prove his claim at the first meeting. In *re W. A. Saunders*, 13 B. R. 164.

A creditor who has been preferred by a deed of trust to which he has never assented, may renounce it and prove his debt at the first meeting. *Ibid.*

If the preferred creditor asks leave to prove his debt, the court can not in such proceeding render a judgment or decree directing the payment to the assignee of the money received as a preference. In *re William D. Forbes*, 5 Biss. 510.

If the assignee accepts the amount received by a preferred creditor after he has put in his proof, and the creditor has put in considerable proof before the special examiner to whom the action has been referred, and dismisses his suit upon payment of costs, this is a surrender, and the creditor may prove his debt. In *re John Rlordon*, 14 B. R. 332; s. c. 51 How. Pr. 271.

The law has not determined the manner in which a surrender shall be made. An agreement that other creditors may share in the proceeds of a sale thereof may be treated as a surrender. In *re Detert*, 11 B. R. 393; s. c. 7 C. L. N. 130; s. c. 14 A. L. Reg. 166.

Where the creditor is allowed to surrender after the bringing of a suit, he may be required to pay the compensation of the assignee's counsel and the expenses to which the assignee may have been subjected in consequence of the suit, before he is allowed to prove his debt. *Burr v. Hopkins*, 12 B. R. 211; s. c. 6 Biss. 345.

No part of the debt can be proved, although a prior mortgage securing the debt in part was surrendered when the mortgage was taken. In re *James Jordan*, 9 B. R. 416; s. c. 7 Pac. L. R. 194.

The attempt of an indorsee to avail himself of a security given to the payee by proving his debt as secured, will not defeat his claim upon the note. In re *Kansas City Manuf. Co.*, 9 B. R. 76.

When payments have been made upon a debt as an entirety, and afterward applied to certain notes constituting only a portion thereof, the preference affects the whole debt. To permit a creditor to avoid the effects of the acceptance of such a preference, by a subsequent application and indorsement of the amount of such preference upon particular notes, nearly paying the same in full, would defeat the provisions of the law. In re *Kingsbury et al.*, 3 B. R. 318.

If the preferred debt is single and entire, the illegal preference affects the whole of it, though the property received does not equal it in value. But otherwise, if in their origin, or by contract, the debts of the creditor are not single and entire, but divided, or divisible and disconnected, and the creditor receives a preference distinctly as one, and not the other. A claim consisting of a running and apparently continuous account, made up of items of goods purchased at various times, constitutes *prima facie* but one debt or claim within the meaning of the bankruptcy act. The creditor may show that the debt preferred is disconnected from, and not the same debt as that which is offered for proof. An application for this purpose may be made, even after a decision from an appeal from an order disallowing the claim. The effect of the recovery by the assignee is to establish, as an adjudicated fact, that the creditor has received a fraudulent preference in respect to the preferred claim. In re *Richter's Estate*, 4 B. R. 221; s. c. 1 Dillon. 544; in re *John F. Lee*, 14 B. R. 89.

Where a creditor has separate and disconnected debts as to which he has received separate and distinct preferences, he may surrender as to some, and prove and receive dividends as to them, without surrendering as to the others. In re *D. G. Holland*, 8 B. R. 190.

If a party proves a claim consisting of two items, an account and a note, he can not, when objection is made to the proof on account of a preference, divide the proof into two parts. In re *Barnes, Brother & Herron*, 1 W. N. 21.

Where there is no allegation of bad faith against the preferred creditor, he may be allowed a reasonable sum for his care in selling the goods. In re *William D. Forbes*, 5 Biss. 510.

When the conduct of a creditor in holding on to his preference is without excuse, his proof may be expunged with costs, including an attorney's fee. In re *Forsyth & Murtha*, 7 B. R. 174; in re *James Jordan*, 9 B. R. 416; s. c. 7 Pac. L. R. 194.



When the unprovable character of the claim is founded largely upon presumptions, the proof may be expunged, without costs to either party. In *re Forsyth & Murtha*, 7 B. R. 174.

ACT OF 1898, CH. 6, § 57. \* \* \* **Allowance of Claims.**—

(e) Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

(d) Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

ACT OF 1867, § 5085. The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers.

Statute revised — March 2, 1867, ch. 176, § 23, 14 Stat. 528.

The district court has the power, upon the petition of a creditor whose claim has been rejected, to revise the decision of the assignee rejecting it. It is irregular to act upon such a petition without giving notice thereof to the assignee. He should have an opportunity to answer the petition and contest the claim. If the claim is allowed, the order should only require the assignee to place it upon the list of admitted claims, and pay dividends accordingly. In *re Mittledorfer & Co.*, 3 B. R. 39; s. c. *Chase*, 276.

The list is the list shown by Forms Nos. 32 and 33. That list is to be given to the assignee. The list can be made from the register kept by the assignee under section 5080. In *re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.

Debts are to be considered proved when duly authenticated and sent to the assignee or register. *Ex parte Harris et al.*, In *re Cochrane, Jr.*, 16 B. R. 432.

ACT OF 1898, CH. 3, § 7. **Duties of Bankrupts.**—(a) The bankrupt shall \* \* \* (9) when present at the first meeting of his creditors and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

ACT OF 1867, § 5086. The court may, on the application of the assignee, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit

to an examination on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, to his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate and the due settlement thereof according to law. Such examination shall be in writing, and shall be signed by the bankrupt and filed with the other proceedings.

Statute revised — March 2, 1867, ch. 176, § 26, 14 Stat. 529. Prior Statutes — April 4, 1800, ch. 19, §§ 18, 23, 52, 2 Stat. 26, 28, 34; Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.

**Application for an Examination.**—The words “any creditor” mean any creditor who has proved his claim. Before a creditor can apply for an order to examine the bankrupt, he must prove his claim. In *re Ray*, 1 B. R. 203; s. c. 2 Ben. 53.

Such order may be made, and such examination may be had, on the application of the assignee, or of any creditor, or on the suggestion of the court or register, without any application. The bankrupt and all other persons are subject to examination at all times, at the instance of the assignee, or of any creditor, or of the court, or of the register. A creditor may make an application at any time after he has proved his debt. In *re Baum*, 1 B. R. 5; s. c. 1 Ben. 274; in *re Patterson*, 1 B. R. 100; s. c. 1 Ben. 448; in *re Brandt*, 2 B. R. 215.

If a protest is entered against the allowance of the claim of a creditor who asks for an examination, the register or the court may make the order, as they have the power to make it at all times without any application. In *re Belden & Hooker*, 4 Ben. 225.

The granting of an order for an examination of the bankrupt is not a matter of course, but should only be done in a proper case, on application of a party entitled to apply. The court or register has a discretion to require good cause for granting the order by a petition or affidavit, duly verified, and the exercise of this discretion by the register may be revised by the court. But the application need not be in writing unless required. In *re Solis*, 4 B. R. 68; s. c. 4 Ben. 143; s. c. 2 L. T. B. 158; in *re Julius L. Adams*, 2 B. R. 95; s. c. 36 How. Pr. 51; s. c. 2 Ben. 503; in *re B. T. Vetterlein*, 4 B. R. 599; s. c. 5 Ben. 7.

The proper way to make application is by a petition. In *re Julius L. Adams*, 2 B. R. 95; s. c. 2 Ben. 503; s. c. 36 How. Pr. 51; in *re Brandt*, 2 B. R. 215; in *re Lanier*, 2 B. R. 154.

The petition need not specify the particular matters to which the examination is to be directed. In *re Lanier*, 2 B. R. 154.

The petition on the part of a creditor should show good cause for granting the order, and be verified by affidavit. In *re Julius L. Adams*, 2 B. R. 95; s. c. 2 Ben. 503; s. c. 36 How. Pr. 51.

The petition on the part of the assignee need not show the grounds for the proposed examination, nor be verified by affidavit. As the bankrupt is, theoretically, the ward of the court, and the assignee a quasi officer of

the court in each case, it is only necessary that the court should be satisfied of the bona fides of the assignee's application. In *re Lanier*, 2 B. R. 154; in *re McBrien*, 2 B. R. 197; s. c. 2 Ben. 513.

The application may be made to the court or to the register. If the application is made to the court, it is not necessary that the application should be sustained by any certificate of the register as to the propriety of granting the order. In *re Brandt*, 2 B. R. 215.

Every creditor has a right to examine the bankrupt. Such examination inures to the benefit of all the creditors. But the fact that one creditor has examined the bankrupt is no reason for withholding the privilege from another creditor. Yet the time, manner, and course of the examination should be so regulated as to protect the bankrupt from annoyance, oppression, and mere delay, while at the same time full and fair opportunity is allowed to the creditors to inquire as to the matters specified in this section. In *re Julius L. Adams*, 2 B. R. 272; s. c. 36 How. Pr. 270; s. c. 3 Ben. 7; in *re Gilbert*, 3 B. R. 152; s. c. Lowell, 340.

If a full examination has been already had either upon the application of the assignee or of any other creditor, a subsequent application may be denied, unless it is made to appear that the first examination was either collusive or deficient in some material and specified particulars. In *re James W. Frisbie*, 13 B. R. 349.

Whether the court in the exercise of its discretion will direct a second examination depends on the facts of each particular case. *Ibid.*

The assignee and a creditor stand upon the same footing as to their rights under this section. The particular province of the assignee is to examine the bankrupt as to the disposition, condition, and amount of his property, and the debts due and owing by him, so as to get in the assets properly. A creditor examines the bankrupt, not only for the purpose of discovering property, but more especially to elicit facts upon which objections to the discharge of the bankrupt can be alleged. A creditor, therefore, has the right to examine the bankrupt although the assignee may have already examined him. Where two creditors, or the assignee and a creditor, examine the bankrupt at different times, the statute does not impose any regulations or restrictions upon the party asking for the second examination. The statute would be of little or no practical efficacy if every creditor should be required to investigate all previous examinations of the bankrupt, and so to shape every question as not to be liable to an objection that the bankrupt has answered that question on a previous examination. Every creditor, without reference to anything which may have been done by any other creditor, has the right to put his question in his own way. In view of the object for which the bankrupt invokes the statute, he is not warranted in regarding it as oppressive or unduly annoying. If every one of his creditors exercises his rights, under the statute, of investigating the condition, affairs, and dealings of the bankrupt, and ascertaining whether he has brought himself within the remedial provisions of the act, and is entitled to its benefit. An answer to the same question on a previous examination does not exempt him from answering again when the question is put by another creditor on a subsequent examination. In *re Vogel*, 5 B. R. 393.

When a party inadvertently makes default under one order, he may apply for a second order, and proceed to examine the bankrupt. The right to examine the bankrupt, however, is not to be abused. In *re Van Tuyl*, 2 B. R. 70; in *re Robinson & Chamberlain*, 2 B. R. 516.

When the bankrupt has been examined at considerable length by the assignee, and none of the creditors ask for an examination until the day appointed to show cause against the discharge, it would be unreasonable to require the bankrupt to submit to a new examination, especially when no reason for doing so is shown by the petition. In *re Isidor & Blumenthal*, 1 B. R. 264; s. c. 2 Ben. 123; in *re S. F. Frizelle*, 5 B. R. 122.

A party will not be entitled to a second order for examination, except upon notice and cause shown. In *re Gilbert*, 3 B. R. 152; s. c. *Lowell*, 340.

A voluntary bankrupt may be examined, even prior to an adjudication of bankruptcy. In *re Thomas D. Lee*, 1 N. Y. Leg. Obs. 83; s. c. 4 Law Rep. 486; in *re Parker et al.*, 1 Penn. L. J. 370.

A debtor against whom proceedings in involuntary bankruptcy have been commenced may be examined, even before adjudication, when sufficient foundation is shown for the application. After due service of copies of the petition, and of the orders made in the case upon him, he may be examined when he is shown *prima facie* to have property which he has, in disobedience to an order of the court, refused to surrender to the marshal. For some purposes, the distinction between "debtor" and "bankrupt"—the former applying to a defendant before adjudication, and the latter to a defendant after adjudication—is used and observed in the bankruptcy act; yet, for other purposes, these two terms are used as synonymous terms. In *re Bromley & Co.*, 3 B. R. 686; in *re Salkey & Gerson*, 9 B. R. 107; s. c. 5 Biss. 486; in *re Mendenhall*, 9 B. R. 285; in *re Heusted*, 5 Law Rep. 510.

The power to examine a debtor prior to an adjudication of bankruptcy should not be exerted unless in case of actual necessity. It is not as of course, but only under such exigencies as seem to require its exercise for the purpose of promoting justice and the rights of creditors. In *re Salkey & Gerson*, 9 B. R. 107; s. c. 5 Biss. 486.

The time to examine the bankrupt does not expire with the making of his application for his discharge. In *re Solis*, 4 B. R. 68; s. c. 4 Ben. 143; s. c. 2 L. T. B. 158; in *re Wm. H. Long*, 3 B. R. (quarto) 66.

The words "at all times" must be read in connection with the subsequent clauses of the statute. All these provisions tend to show that it is only until his discharge that the bankrupt is under the summary jurisdiction of the court, to be proceeded against by order in its discretion and to be punished for neglect or refusal to pay by imprisonment, as for a contempt of court. He can not, therefore, be required to submit to an examination after he has obtained his discharge. In *re Nathaniel Dole*, 7 B. R. 538; s. c. 9 B. R. 193; s. c. 11 Blatch. 499; in *re G. C. Jones*, 6 B. R. 386; in *re C. Dean*, 3 B. R. 769; in *re Witkowski*, 10 B. R. 209. *Contra*, in *re Heath & Hughes*, 7 B. R. 448.

The law provides the means by which an absent bankrupt may be brought forward, at a given day and place, to be examined. But when he appears without this coercive power at a regular meeting, a party who happens to be present may ask for leave to examine him, and should be permitted to do so, unless there is no ground or reason for the request. In *re Brandt*, 2 B. R. 215; in *re Bromley & Co.*, 3 B. R. 686.

No previous notice is required to be given to any person of the application for the order. The order is to be made *ex parte*. In *re Macintire*, 1 B. R. 11; s. c. 1 Ben. 277.

The order may be made by the register. In *re Mackintire*, 1 B. R. 11; s. c. 1 Ben. 277; in *re Lanier*, 2 B. R. 154; in *re Brandt*, 2 B. R. 215; in *re B. T. Vetterlein*, 4 B. R. 599; s. c. 5 Ben. 7; in *re Pioneer Paper Co.*, 7 B. R. 250.

Form No. 45 is the proper order. In *re Lanier*, 2 B. R. 154; in *re Brandt*, 2 B. R. 215.

The register is not entitled to charge any fee for making the order. In *re Macintire*, 1 B. R. 11; s. c. 1 Ben. 277.

Form No. 45 is a summons, and, under Rule II, blanks not filled up, but bearing the signature of the clerk and the seal of the court, should, on application, be furnished to the register. In *re Bellamy*, 1 B. R. 64; s. c. 1 Ben. 309; s. c. 1 L. T. B. 22.

It is not necessary that a subpoena for a witness should be served by the marshal. It may be served by any one. The party making the service is entitled to the fees. *Gordon, McMillan & Co. v. Scott & Allen*, 2 B. R. 86; s. c. 1 L. T. B. 99; s. c. 7 A. L. Reg. 749.

The service of the order should be personal. In *re Joseph H. Hodges*, 11 B. R. 369.

If the bankrupt is in another district, and the order is served on him there, the district court has no authority to arrest him for not appearing to answer process so served. *Ibid*.

The bankrupt is most certainly entitled to reasonable time, after notice of the application for his examination; but such time, or the length of such time, always depends upon circumstances and facts surrounding the bankrupt; the distance he is from court or the place of his examination, and also upon what, if any, particular facts he is to be examined. If the bankrupt is a merchant, and has been doing a large and complicated business, and he is notified that his examination is to cover his entire business operations, a reasonable time would, manifestly, be much longer than in a case where the notice of examination was in regard to a few items of his property pertaining to his own person, such as watch, ring, and money in his pocket when service was made upon him. A reasonable notice is such time as will enable him to appear before the court with such knowledge as may be under his control upon the matters of the investigation or information asked for. An opportunity to study under the tutelage of counsel is not required, and will not be granted when the interrogatories are plain and simple, and do not call for the exercise of any skill. In *re Bromley & Co.*, 3 B. R. 686.

**Mode of Conducting the Examination.**—The examination may be had before the register. In *re Tanner*, 1 B. R. 316; s. c. 2 Ben. 211; s. c. *Lowell*, 215; in *re Lanier*, 2 B. R. 154.

The court may direct the examination to be taken before a register in another district. In *re Joseph H. Hodges*, 11 B. R. 369.

The bankrupt is bound to appear, and is not entitled to fees as a witness. In *re Okell*, 1 B. R. 303; s. c. 2 Ben. 144; s. c. 1 L. T. B. 32; in *re McNair*, 2 B. R. 219.

As an order for an examination is made *ex parte*, the bankrupt, on appearing in pursuance to the order, may make any objection or raise any question which would have been proper if an opportunity had been afforded him before the order was granted. In *re James W. Frisbie*, 13 B. R. 349.

It is for the creditor to see that due appointments are made with the register for the purpose of examining the bankrupt, and to give the other party notice of them. The bankrupt's duty is performed by being ready to be examined on due notice. In *re Littlefield*, 3 B. R. 57; s. c. *Lowell*, 331; s. c. 1 L. T. B. 164; in *re Gilbert*, 3 B. R. 152; s. c. *Lowell*, 340.

The testimony of the bankrupt taken on his examination is a deposition. In *re Levy et al.*, 1 B. R. 136; s. c. 1 Ben. 496; in *re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.

The bankrupt is a witness, and subject to cross-examination like any other witness. In *re Levy et al.*, 1 B. R. 136; s. c. 1 Ben. 496; in *re Leachman*, 1 B. R. 391; in *re Maynard Bragg*, 1 N. Y. Leg. Obs. 119; s. c. 5 Law Rep. 323.

The statute does not intend that the bankrupt shall become a competent witness in all respects, so as to be enabled to give testimony on his own behalf beyond and out of the subject-matter of his examination. In *re Maynard Bragg*, 1 N. Y. Leg. Obs. 119; s. c. 5 Law Rep. 323.

The bankrupt is to answer substantially like a witness, and not merely to have interrogatories filed and propounded after the manner adopted in equity and admiralty. It is not intended that the bankrupt, or his attorney, shall write the answers, but merely that the deposition should be reduced to writing. In *re Tanner*, 1 B. R. 316; s. c. 2 Ben. 211; s. c. *Lowell*, 215.

The answers of the bankrupt are to be made orally to the court or to a duly appointed officer of the court. In *re Bromley & Co.*, 3 B. R. 686.

The register has no power to decide upon the competency, materiality, or relevancy of a question. In *re Levy et al.*, 1 B. R. 136; s. c. 1 Ben. 496; in *re Rosentfield, Jr.*, 1 B. R. 319; s. c. 1 L. T. B. 81; s. c. 15 Pitts. L. J. 245; in *re Koch*, 1 B. R. 549; in *re Lyon*, 6 I. R. R. 135.

The manifest intention of Rule X is, that when a question is objected to, the question and the fact and grounds of objection shall be taken down by the register, and that the question, although incompetent, is immaterial, or irrelevant, shall be answered, and that when the deposition is closed, the court shall deal with it as a whole, and then pass upon the question as to what parts of it are incompetent, immaterial, or irrelevant. The bankrupt or other witness has the power, in a clear case of abuse, to refuse, under the advice and responsibility of counsel, to answer a question.

Then, on application to punish the party for contempt, which must come before the court, the whole question as to competency, relevancy, and materiality, will be raised in a proper way for adjudication. The good sense of rule X is, that it extends, not only to objections to questions, but also to objections to answers and testimony, on the grounds of competency, materiality, and relevancy, and that neither question, nor answer, nor testimony, is to be held ultimately incompetent, immaterial, or irrelevant, unless objected to on the record for some ground of incompetency, immateriality, or irrelevancy, stated on the record. In *re Levy et al.*, 1 B. R. 136; s. c. 1 Ben. 496; In *re Bond*, 3 B. R. 7.

The register should declare his opinion when the objection is made, and should order the party to answer the question, if he so decides. If an exception is taken, he should certify it for the summary consideration of the court, the examination proceeding in its other parts. If the party without such exception refuses to answer the question, his contumacy should be reported. In *re Reakirt*, 7 B. R. 329.

The register is required to note the objection on the deposition — that is, not merely the fact of objection; but the ground of objection; and, if no ground of objection is assigned, he is not bound to note the fact of objection; and the ground of objection must be directed to the competency, materiality, or relevancy of that which is objected to. In *re Levy et al.*, 1 B. R. 136; s. c. 1 Ben. 496.

Questions arising in the course of the examination may be certified to the court, under section 5011, when put in proper form. In *re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508; in *re Levy et al.*, 1 B. R. 136; s. c. 1 Ben. 496.

Whether the bankrupt has properly answered a question, is a point that may be certified to court for decision at the request of the creditor. In *re Holt*, 3 B. R. 241.

No rule can be laid down which will enable the register to determine whether the bankrupt under examination ought or ought not to be allowed to consult counsel. The solution of the matter must be left for the register to decide according to the circumstances of each particular case. Generally, he should not allow consultation. In *re Patterson*, 1 B. R. 147; s. c. 1 Ben. 508; in *re Tanner*, 1 B. R. 316; s. c. 2 Ben. 211; s. c. Lowell, 215; in *re Judson*, 1 B. R. 364; s. c. 2 Ben. 210; s. c. 35 How. Pr. 15; in *re J. C. Collins*, 1 B. R. 551; in *re Lord*, 3 B. R. 243.

One creditor has no right to interpose any objection to the examination of a bankrupt by another creditor. In *re Edwin K. Winship*, 7 Ben. 194.

The examination of the bankrupt may be adjourned for good cause shown. In *re Mawson*, 1 B. R. 271.

The bankrupt is exempt from arrest while obeying the order to appear for examination. In *re G. W. Kimball*, 1 B. R. 193; s. c. 2 Ben. 38.

A bankrupt who obeys the process of the court, and places himself within its jurisdiction, may file a preliminary objection, which goes to the right to examine him, and may refuse to be sworn upon that ground. In *re Nathaniel Dole*, 7 B. R. 538; s. c. 9 B. R. 193; s. c. 11 Blatch. 499.

When the bankrupt refuses to be sworn on account of a preliminary objection which goes to the right of the party to examine him, a certificate will not be given to court so that he may be declared in contempt, for he has a right to have the question decided, and his declining to be sworn after raising the objection is not an act constituting a contempt of court. *Ibid.*

So long as the debt of a creditor stands proved and unimpeached, the claim that it had been extinguished by an offset, or does not exist, furnishes no ground for a refusal by the bankrupt to be sworn and examined. *In re N. W. Kingsley*, 7 B. R. 558; s. c. 6 Ben. 300; *in re Edwin K. Winship*, 7 Ben. 194.

When satisfied that an examination has been sought, or is being carried on to gratify malice or mere curiosity, it is the duty of the court to arrest it. *In re Salkey & Gerson*, 9 B. R. 107; s. c. 5 Biss. 486.

**Upon what Topics the Bankrupt may be Examined.**—The bankrupt may decline to answer a question where, by answering, he would criminate himself. *In re Patterson*, 1 B. R. 147; s. c. 1 Ben. 508; *In re Koch*, 1 B. R. 549.

Contra, The power given to the court to examine the bankrupt at all times, upon reasonable notice, is a fundamental as well as an important element in the administration of the bankruptcy law. Without such power, proceedings in bankruptcy, in many cases, would be ineffectual, thereby defeating the equity designed by the act. While it is true, from the necessity of the case, that difficult questions are liable to arise upon the examination of all bankrupts, yet it is also true that the bankrupt can not cover up his fraud behind the shield that if he answers he will criminate himself, by proving up his fraud in testifying as to the distribution of his property. Though such examination may expose him to penalties for fraudulent concealment, or fraudulent disposition of his property, he is left to the judgment of the law. Notwithstanding it may be possible, probable, that he may be protected from disclosing some distinct criminal act, yet even in such case he can not be protected in refusing to discover all his estate and effects, and the full particulars relating to them, though thereby he may show that he has been guilty of fraud or of fraudulent concealment, or that he owns property which he has illegally obtained, and will thus be liable to penalties. It has been held that a bankrupt is bound to answer questions relating to particular property, though at the time an indictment was pending against him for concealment of such property. It has been held, also, that a bankrupt is compelled to answer questions touching his estate and effects, although such answer or answers might tend to convict him of perjury committed by him upon a former occasion, and also be evidence against him that he had incurred penalties by concealing his effects. And it has also been held that he can not refuse to answer questions tending to show that he has committed the act of bankruptcy charged in the involuntary petition. *In re Bromley & Co.*, 3 B. R. 686.

The bankrupt must state whether or not he has played cards, faro, or any other game of chance with a certain person named in the interrogatory,



and whether he has lost any money at games of chance, even though he declines to answer on the ground that his answers would criminate or degrade himself. *In re Richards*, 4 B. R. 93; s. c. 4 Ben. 303.

If the purpose of the examination be to elicit facts to be used in opposing the bankrupt's discharge, it is not competent for the register to summon any witness or person who may know or be suspected of knowing facts pertinent, or that might be serviceable in the preparation of specifications. In regard to such facts, a creditor should be left to establish them on the trial of the issues, as parties do in ordinary trials at law. Such information no one has the right to demand or obtain otherwise than it may be voluntarily given, unless it be upon the trial of issues or questions made up. But it is not so with the bankrupt. In relation to such of his creditors as prove their debts, he stands upon different grounds altogether. When he files his petition, he asks that in consideration of his complying with every requirement of the law, he may be absolved from every legal obligation to his creditors. This is an extraordinary exemption, and the law only allows it when he surrenders himself to be dealt with in an extraordinary way, if the court shall see proper to exercise that power to the ends of justice. *In re Brandt*, 2 B. R. 215; *in re Vogel*, 5 B. R. 393.

The bankrupt can not be examined in regard to property which does not belong to him. *In re Van Tuyl*, 1 B. R. 636; *in re Carson & Hard*, 2 B. R. 107.

But he may be examined in regard to property in which it may possibly be shown that he has an interest. *In re Bonesteel*, 2 B. R. 330; *in re Carson & Hard*, 2 B. R. 107.

The bankrupt must answer questions in relation to his wife's property when it is shown that he may possibly have an interest in it. *In re D. Craig*, 3 B. R. 100; s. c. 4 B. R. (quarto) 50; s. c. 3 Ben. 353; *in re Clark*, West et al., 4 B. R. 237.

The bankrupt can not be examined as to property acquired or business done after the date of the filing of the petition in bankruptcy, unless it can be shown that the same has some connection with his property or business before that time. *In re Rosenfield, Jr.*, 1 B. R. 319; s. c. 1 L. T. B. 81; s. c. 16 Pitts. L. J. 245; *in re Patterson*, 1 B. R. 125; s. c. 1 Ben. 508; *in re Levy et al.*, 1 B. R. 136; s. c. 1 Ben. 496.

Interrogatories in regard to money in the possession of the bankrupt soon after the commencement of proceedings in bankruptcy, are relevant and must be answered. The assignee is entitled to any facts directly or circumstantially tending to show that the bankrupt, before filing his petition in bankruptcy, was in possession of money which he had concealed, but which should have gone to the assignee. The point of inquiry in such cases is, when did the bankrupt acquire it, and how? The assignee will have to show that it was acquired before bankruptcy, and he may also show that, though acquired after, still it is the proceeds of property or effects belonging to the assignee. *In re McBrien*, 3 B. R. 345; s. c. 3 Ben. 481.

The bankrupt may be examined in regard to matters which transpired before the creation of the debt of the creditor. *In re D. Craig*, 3 B. R. 100; s. c. 3 Ben. 353.

Evidence can not be introduced to prove that the debt of a creditor was contracted by fraud. The question of fraud in the creation of a debt can not be litigated in the proceedings in bankruptcy. In *re J. S. Wright*, 2 B. R. 142; s. c. 36 How. Pr. 167; s. c. 2 Ben. 509; in *re Tallman*, 1 B. R. 462; s. c. 2 Ben. 348. Contra, in *re Koch*, 1 B. R. 549.

The conduct of the bankrupt in withdrawing from the office of the register before the completion of his examination, is a contempt of court. In *re Vogel*, 5 B. R. 393.

The examination of the bankrupt is not competent evidence against him in a criminal action. Evidence given or statements made by a party, under compulsion or order of court, tending to criminate himself, can not be put in evidence in a criminal proceeding against him. *U. S. v. Prescott*, 2 Dillon, 405; in *re Brooks*, 5 Pac. L. R. 191.

The State courts have no jurisdiction to punish a party for the crime of perjury committed in the course of an examination before a register. *State v. Pike*, 15 N. H. 83.

An examination of a bankrupt by a creditor does not bar an action by the assignee against the vendee of the bankrupt to recover property fraudulently conveyed by the bankrupt to such vendee. *Bradley v. Hunter*, 50 Ala. 265.

§ 5086A. (June 22, 1874, ch. 390, § 8, 18 Stat. 180.) That in all causes and trials arising or ordered under this act, the alleged bankrupt, and any party thereto, shall be a competent witness.

This section only applies to civil causes. The bankrupt is not a competent witness in a criminal proceeding against him. *U. S. v. Black*, 12 B. R. 340; s. c. 10 Pac. L. R. 41.

ACT OF 1898, CH. 5, § 41. Contempts.—(a) A person shall not, in proceedings before a referee, refuse to appear after having been subpoenaed, or upon appearing refuse to take the oath as a witness, or after having taken the oath, refuse to be examined according to law; *Provided*, That no person shall be required to attend as a witness outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered him.

ACT OF 1867, § 5087. The court may, in like manner, require the attendance of any other person as a witness, and if such person fails to attend, on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person, and bring him forthwith before the court, or before a register in bankruptcy, for examination as a witness.

Statute revised — March 2, 1867, ch. 176, § 26, 14 Stat. 529. Prior Statute — April 4, 1860, ch. 19, § 14, 2 Stat. 25.

It is not necessary to give the bankrupt notice of the time and the place of the examination of a witness summoned by the assignee. An examination by an assignee, and an examination by creditors, are two independent proceedings, and one may be conducted without reference to the other. In *re Levy et al.*, 1 B. R. 107; s. c. 1 Ben. 454.

A mere witness may be examined before the bankrupt himself, and there need not be any matter of controversy to be settled by testimony. In *re Fredenburg*, 1 B. R. 208; s. c. 2 Ben. 133; in *re Blake*, 2 B. R. 10.

A receiver appointed by a State court may be examined as a witness. In *re William W. Hulst*, 7 Ben. 40.

An assignee may be subpoenaed and required to testify in the same manner as any other witness, and the register has authority to make the requisite order. In *re Elmer C. Smith*, 14 B. R. 432.

An assignee is not subject as of course to an examination by any creditor whenever the latter may desire it, but will be protected against unnecessary annoyance by refusing an application for his examination unless upon some issue regularly referred to the register. *Ibid.*

One creditor has no right to interpose objections to the course of the examination of a witness by another creditor. The only person who properly has an opposing interest in such an examination is the bankrupt himself, and to him is preserved and allowed the right of cross-examination. In *re Stuyvesant Bank*, 7 B. R. 445; s. c. 6 Ben. 33.

A party whose transactions with the bankrupt are being investigated can not appear by counsel at the examination of a witness. In *re Comstock & Co.*, 13 B. R. 193; s. c. 3 Saw. 517.

A witness is bound to attend before the register, although the summons is served on him out of the district, if he does not live more than one hundred miles from the place where he is required to attend. In *re Wm. S. Woodward*, 12 B. R. 297; s. c. 7 C. L. N. 87; s. c. 10 Pac. L. R. 14.

The witness may be examined, even though he is a party to proceedings instituted by the assignee to recover property alleged to belong to the bankrupt's estate. In *re Feinberg et al.*, 2 B. R. 475; s. c. 3 Ben. 162.

A witness must answer questions put to him so far as they relate to any matter of examination specified in this section. In *re Belden & Hooker*, 4 B. R. 194; in *re Stuyvesant Bank*, 7 B. R. 445; s. c. 6 Ben. 33.

A witness must state where he got the money with which he purchased certain claims against the bankrupt's estate. In *re Lathrop, Oady & Burtis*, 4 B. R. (quarto) 93.

The right to refuse to answer a question on the ground of privilege does not warrant a refusal to be sworn as a witness. The privilege can not be interposed until a question is asked which invades the privilege. In *re Woodward et al.*, 3 B. R. 719.

An attorney who took charge of an auction sale for the bankrupt must testify in regard to the amount and disposition of the proceeds. It is a mistake to suppose that an attorney is privileged from answering as to everything which comes to his knowledge while he is acting as attorney. The privilege only extends to information derived from his clients as such. Questions in regard to the amount and disposition of the proceeds

of a sale only call upon him to state his own proceedings in the disposition of the stock of goods, and the amount he received therefor. It is solely his own acts which he is required to disclose, and not anything whatever which his clients ever communicated to him. These acts were not professional, and did not appertain to the duty of an attorney, but were such as any agent could have done, being the ordinary proceedings of an agent in selling the property of his principal, and paying over the proceeds which were the subject of investigation and inquiry. *In re O'Donohue*, 3 B. R. 245.

An attorney who has received a conveyance of land from a bankrupt, and has shortly afterward conveyed the property to the wife of the bankrupt, must answer questions touching such conveyances. In such a case the rights and privileges of the attorney, and his duty to his client, are entirely separate and distinct from his rights and duties as a purchaser and vendor, the transaction in relation to the real estate not being a part and parcel of, or in and about any lawsuit in which he was counsel for either the bankrupt or his wife. *In re Bellis & Milligan*, 3 B. R. 199; s. c. 38 How. Pr. 79; s. c. 3 Ben. 386; s. c. 1 L. T. B. 178.

An attorney for the bankrupt may be required to state whether, at a certain date, he received any checks drawn to the order of the bankrupt by a certain person, and what disposition was made of any such checks so received. *In re Jas. S. Aspinwall*, 10 B. R. 448; s. c. 7 Ben. 433.

An attorney for the bankrupt may be required to state whether he drew or directed the drawing of a certain deed from the bankrupt. *Ibid.*

An attorney of the bankrupt may be required to state what affairs of the bankrupt were the subject of a conversation between him and other persons than the bankrupt, although he can not be compelled to disclose information about such affairs imparted to him by the bankrupt or received from persons to whom he was referred by the bankrupt for the purpose of obtaining such information as counsel for the bankrupt. *Ibid.*

A witness must answer all proper questions on matters relating to his trade and dealings with the bankrupt prior to the commencement of proceedings in bankruptcy; and if, to answer properly, fully, and truthfully any such question, it is necessary that he shall produce a copy of any transaction of his with the bankrupt, as contained in any book of the witness, such copy must be produced. *In re Earle*, 3 B. R. 564.

It is no sufficient reason for a refusal to state the consideration paid by the witness for certain claims assigned to him, that the consideration did not come from the bankrupt or his estate, or that to testify would reveal his own private business, or that an answer might prejudice him in a suit then pending. *In re Benjamin J. H. Trask*, 7 Ben. 60.

A witness can not refuse to answer questions concerning his dealings, etc., with the bankrupt, on the ground that his answer may furnish evidence against him in a civil case brought, or to be brought, on behalf of the assignee. The main, if not the only, purpose of the statute authorizing such an examination, is to enable the assignee to obtain evidence for civil suits, or to ascertain that there is no such evidence. *In re Fay et al.*, 3 B. R. 600; *in re Danforth*, 1 Penn. L. J. 118.

The assignee can compel the examination of a preferred creditor, and obtain a full disclosure. *Garrison v. Markley*, 7 B. R. 246.

The president of a corporation may be compelled to state what was the consideration of a judgment obtained by the corporation against the bankrupt, although the purpose is to impeach it as fraudulent. *In re Pioneer Paper Co.*, 7 B. R. 250.

A witness on cross-examination is not bound to answer a question not relating to any matter of fact in issue, nor to any matter contained in his direct testimony, when an answer thereto would tend to degrade him. *In re H. Lewis*, 3 B. R. 621; s. c. 4 Ben. 67.

A mere witness can not have the assistance of counsel. *In re Fredenberg*, 2 B. R. 268; s. c. 2 Ben. 133; *in re Feinberg et al.*, 2 B. R. 475; s. c. 3 Ben. 162; *in re Stuyvesant Bank*, 7 B. R. 445; s. c. 6 Ben. 33; *in re Comstock & Co.*, 13 B. R. 193; s. c. 3 Saw. 517.

The fees to which witnesses are entitled are five cents a mile for coming and returning, and \$1.50 for each day's attendance. The "travelling expenses", mentioned in Rule XXIX, mean no more than the traveling fees allowed by section 848. *In re Wm. Griffen*, 1 B. R. 371; s. c. 2 Ben. 209.

The clerk's certificate is only *prima facie* evidence of the number of days that a witness attended before a register. *In re J. Crane & Co.*, 15 B. R. 120.

A witness is entitled to fees only for the days of actual attendance, and not for the days on which he was ready to attend. *Ibid.*

The memoranda, or entries made by the register, may be used as evidence to prove what proceedings have been had before him. *Ibid.*

The time for examining witnesses is not terminated by the application for a discharge. The time for filing specifications against a discharge may be kept open by adjournment until a reasonable opportunity is afforded for examination of witnesses. *In re Seckendorf*, 1 B. R. 626; s. c. 2 Ben. 462; *in re Mawson*, 1 B. R. 271.

The answers of a witness made by him in an examination under oath before a register in bankruptcy are admissible to contradict him. They fall within the rule which allows a witness to be impeached by proof that he has made conflicting statements at other times. The fact that the examination was not completed, and the answers not signed, affects the weight of the testimony, but does not render it incompetent. The answers which are reduced to writing by his agent at his dictation are admissible as his statements. *Knowlton v. Moseley*, 105 Mass. 136.

ACT OF 1867, § 5088. For good cause shown, the wife of any bankrupt may be required to attend before the court to the end that she may be examined as a witness; and if she does not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he proves to the satisfaction of the court that he was unable to procure her attendance.

Statute revised — March 2, 1867, ch. 176, § 26, 14 Stat. 529. Prior Statute — April 4, 1800, ch. 19, § 24, 2 Stat. 28.

The examination of the wife of the bankrupt is not a matter of right, and where an application for such an examination is made merely for delay, it may be refused. *In re Selig*, 1 B. R. 186.

An examination of the bankrupt's wife will only be ordered when a *prima facie* case is made out by affidavit; and such a case is not made out by showing that the bankrupt has committed frauds of which the wife is probably cognizant. It is not the intention of the statute to destroy the usual and proper confidence between husband and wife any more than between attorney and clients. The cases in which the wife may be examined are, where she is, on reasonable grounds, suspected of having, or of having had, property in her possession which should have been surrendered to the assignee, or to have participated actively in other frauds upon the statute. In that case, conversations may be of the *res gestae*, and may be inquired into. She is a party to a fraud, and may be fully examined concerning it. When she professes to be a creditor of her husband's estate, and offers her debt for proof, she can be fully examined in regard to it, like any other person under similar circumstances. *In re Gilbert*, 3 B. R. 152; *s. c. Lowell*, 340.

The wife of the bankrupt is entitled to witness fees for attendance and travel, the same as any other witness. *In re Wm. Griffen*, 1 B. R. 371; *s. c. 2 Ben.* 209.

The wife of the bankrupt is not bound to appear unless the fees are paid or tendered to her at the time of the service of the summons. *In re Van Tuyl*, 2 B. R. 70.

The order for the bankrupt's wife to appear for examination may, in certain cases, be served on the bankrupt himself, and when she fails to attend, the bankrupt is not entitled to a discharge, unless he can prove that he was unable to procure her attendance. *In re Van Tuyl*, 2 B. R. 579; *s. c. 3 Ben.* 237.

The wife of the bankrupt must attend and submit to an examination, the same as any other witness. If she does not attend on being summoned, her attendance may be compelled by a warrant to the marshal, under which she may be brought before the register and detained until her examination is concluded. If, when she comes, or is brought before the register, she refuses to answer, she may be punished for contempt. *In re Woolford*, 3 B. R. 444; *s. c. 4 Ben.* 9.

When the reasons assigned for the nonattendance of the bankrupt's wife relate to the legal right of the court, under the circumstance of the case, to compel her to attend, the proper proceeding to enforce attendance is to pass an order to show cause why a warrant should not issue. *In re Belis & Milligan*, 3 B. R. 270; *s. c. 38 How.* Pr. 88.

The bankrupt's wife is not entitled to the aid of counsel on her examination. *In re J. A. Schonberg*, 7 Ben. 211.

The counsel for the bankrupt is not entitled to advise the wife of the bankrupt while on examination. *Ibid.*

When the bankrupt's wife alleges the advice of counsel as her only reason for refusing to produce a letter, she should produce it if it pertains to a transaction between her and the bankrupt. *Ibid.*

If the bankrupt contracted for a house, but took the title in his wife's name, she may be examined fully concerning all the facts and circumstances of the transaction, and concerning the money used to pay for the house. *Ibid.*

The bankrupt's wife must answer questions in regard to her property when it is shown that her husband may possibly have an interest in it. *In re D. Craig*, 3 B. R. 100; s. c. 4 B. R. (quarto) 50, 52; s. c. 3 Ben. 353.

§ 5089. If the bankrupt is imprisoned, absent, or disabled from attendance, the court may order him to be produced by the jailer, or any officer in whose custody he may be, or may direct the examination to be had, taken, and certified at such time and place and in such manner as the court may deem proper, and with like effect as if such examination had been had in court.

Statute revised — March 2, 1867, ch. 176, § 26, 14 Stat. 529. Prior Statute — April 4, 1800, ch. 19, § 18, 2 Stat. 26.

**ACT OF 1898, CH. 3, § 8. Death or Insanity of Bankrupts.—**

(a) The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

ACT OF 1867, § 5090. If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

Statute revised — March 2, 1867, ch. 176, § 12, 14 Stat. 522. Prior Statute — April 4, 1800, ch. 19, § 45, 2 Stat. 33.

Sale of lands of a bankrupt by the assignee does not divest dower of bankrupt's wife. *Lazear v. Porter*, 18 B. R. 549.

The word "proceedings" does not include a discharge, unless there is a compliance with the requirements of section 5113, in regard to the application for the discharge and the oath. No discharge can be granted where the debtor dies before these requirements are complied with. This clause must be taken as applying to such proceeding as may be taken by the assignee or other parties in settling the estate. *In re O'Farrel et al.*, 2 B. R. 484; s. c. 3 Ben. 191; s. c. 1 L. T. B. 159; *in re Quinke*, 4 B. R. 92; s. c. 2 Biss. 354.

The decease of one partner prior to any adjudication upon the question in bankruptcy under an involuntary petition, is not a legal cause for a dismissal of the petition as against the surviving partners. *Hunt v. Pooke*, 5 B. R. 161.



If the debtor in a case of involuntary bankruptcy dies after the issuing of the order to show cause, and before trial, the proceedings abate. Proceedings in involuntary bankruptcy are analogous to actions at law for torts, which abate on the death of the party. In *re John V. McDonald*, 8 B. R. 237; s. c. 30 Leg. Int. 332; s. c. 20 Pitts. L. J. 185; s. c. 5 C. L. N. 504; s. c. 6 Pac. L. R. 94.

Proceedings in involuntary bankruptcy do not abate by the death of the bankrupt after the entry of the order of adjudication, but before the actual issuing of the warrant. The warrant is required to be issued forthwith. It is, in judgment of law, issued simultaneously with the entry of the order of adjudication. Whenever it is actually issued, it relates back, for the purposes of this section, to the entry of the order of adjudication. This section contemplates the issuing of the warrant in a voluntary case simultaneously with the entry of an order of adjudication, and the same intent exists in regard to an involuntary case. In *re E. C. Litchfield*, 9 B. R. 506; s. c. 7 Ben. 259.

There is no party to a creditor's petition, except the petitioning creditor and the bankrupt. A person who does not claim any right or interest in the property of the debtor, or seek to assert any claim to any specific property in the hands of the assignee, can not, merely because an injunction has been issued against him, move to vacate the adjudication on the ground of the death of the debtor prior to the adjudication. *Karr v. Whittaker*, 5 B. R. 123.

§ 5091. All creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate, pro rata, without any priority or preference whatever, except as allowed by section fifty-one hundred and one. No debt proved by any person liable, as bail, surety, guarantor, or otherwise, for the bankrupt, shall be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct.

Statute revised — March 2, 1867, ch. 176, § 27, 14 Stat. 529. Prior Statutes — April 4, 1800, ch. 19, § 31, 2 Stat. 30; Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

This section simply provides that when the creditors who are entitled to share in the distribution are determined they shall take pro rata. In *re Byrne*, 1 B. R. 464; s. c. 7 A. L. Reg. 499.

The State laws in relation to the distribution of the estate of decedents do not govern in the distribution of the estate of a bankrupt. The bankrupt's assets must be divided in accordance with the provisions of the bankruptcy act. In *re Erwin & Hardy*, 3 B. R. 580.



The claim of a trustee of a bankrupt corporation who has rendered himself individually liable to the creditors, can not be postponed until the other creditors are paid in full. *Bristol v. Sanford*, 13 B. R. 78; s. c. 12 Blatch. 341.

ACT OF 1898, CH. 6, § 55. **Meetings of Creditors.**—(a) The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

(b) At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

(c) The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act.

(d) A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

(e) The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

(f) Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

ACT OF 1867.—(See Duties of Trustee, *ante*, Act of 1898, § 47, and Meeting of Creditors, *ante*, Act of 1898, § 55.)

§ 5092. At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and he shall also produce and file vouchers for all payments for which vouchers are required by any rule of the court; he shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, and showing what debts or claims are yet undetermined, and what sum remains in his hands. The majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one-half in value of the creditors attend the meeting, either in person or by attorney, it shall be the duty of the assignee so to determine.

Statute revised — March 2, 1867, ch. 176, § 27, 14 Stat. 529. Prior Statutes — April 4, 1800, ch. 19, § 29, 2 Stat. 29; Aug. 19, 1841, ch. 9, § 10, 5 Stat. 447.

It is not essential that the second and third meetings should be held at any particular time, but only that they should be held at the expiration of certain months, etc.; and unless this means on the very day that the month runs out, there is no day on which it can be said that it is too late to hold these meetings, unless, possibly, it may be said that the second meeting should be called before the end of six months. *In re Littlefield*, 3 B. R. 57; s. c. *Lowell*, 331; s. c. 1 L. T. B. 164.

No second meeting of creditors under section 5092, and no third or other meeting under section 5093, ought to be called unless the assignee has in his hands some money out of which a dividend can be made. *In re Sen*, 1 B. R. 319; s. c. 2 Ben. 153; *in re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.

But they can not be dispensed with except by an order of court predicated upon a report of the assignee showing that there are no assets. *In re A. Alexander*, 3 B. R. (quarto) 20.

Where the assignee, at the expiration of three months from the date of the adjudication of bankruptcy, requests the court so to do, a second

general meeting of the creditors must be called. In *re* Louis H. Rosey, 6 Ben. 137.

When the register states at the meeting that the accounts of the assignee will be filed, and that they can be examined thereafter by any of the creditors who desire to examine the same, and that they will not be audited or passed until the final meeting of creditors, and thereupon makes an entry to that effect without objection from any one, an order allowing the credits claimed by the assignee may be postponed to the final meeting of creditors. In *re* Clark & Binninger, 6 B. R. 204; in *re* Abraham B. Clark, 9 B. R. 67.

The register has the power, and it is his duty, to audit and pass any accounts reported and exhibited at the second meeting. Creditors must be prepared to object, if they desire, to such accounts as the assignee shall report and exhibit. In order to arrive at the net sum to be divided, the outstanding claims not disputed or objected to, must be ascertained, and their amount deducted. If they are not disputed, it is the duty of the register to direct their payment as part of the business of auditing and passing the accounts, even though they have not been actually paid by the assignee. They may properly come under the head of "other expenses," the amount of which is to be retained by the assignee, such retention being specifically authorized by the meeting and the register, to meet the specific items as expenses. In *re* Clark & Binninger, 6 B. R. 197; s. c. 5 Ben. 389.

It is proper to take the views of the creditors in regard to the fees and charges of the assignee, whether a majority is present or not, but their views are not necessarily binding. In *re* Merchants' Ins. Co., 6 Biss. 252.

The allowance of a reasonable compensation is no part of the duty of the creditors' meeting, nor of the register, but is to be made by the court in the exercise of a judicial discretion in view of the nature of the duties performed, and the degree of compensation received from the regular fees. The proper practice is to apply to the court for the allowance previous to the final meeting. *Ibid*.

The assignee's account may be submitted to the creditors' meeting for examination, discussion, explanation, and approval before it is audited. *Ibid*.

Ample opportunity should be given all creditors to examine and object to the assignee's account, but the meeting may, on motion, dispense with the reading of the account and vouchers in detail. *Ibid*.

It is the duty of the register to examine and regulate the charges of the assignee, whether any creditor objects to the account or not. In *re* Jas. M. Sawyer, 14 B. R. 241; s. c. 4 Cent. L. J. 470; in *re* Colwell, 15 B. R. 92.

If the assignee employs an attorney who renders legal services for him, the bill of the attorney therefor should be presented by the assignee as part of his accounts, at the meeting of creditors where the assignee's accounts are required to be presented. The intention is that the disbursements of the assignee in administering the estate, whether only incurred and not yet paid, or whether incurred and paid, shall be submitted to the creditors at a general meeting, and be audited by the register as a part

of the business of auditing the accounts of the assignee. In *re* Hubbell & Chappel, 9 B. R. 523; s. c. 19 I. R. R. 150.

Under special circumstances the court may properly, on due notice to all creditors who have proved their debts, institute an inquiry into the services rendered to an assignee by an attorney, with a view to payment of them prior to the holding of any second general meeting of creditors, but the practice is one not to be encouraged. *Ibid*.

At the second meeting the creditors may dispose of the funds to those who have proved their claims, without leaving in the hands of the assignee a sum sufficient to pay a similar percentage upon the claims set forth in the schedules, but which have not been proved. The whole fund in the hands of the assignee, less such sum as may be retained for expenses and contingencies, should be distributed, unless good cause to the contrary is shown. In *re* William Mills, 11 B. R. 117; s. c. 7 Ben. 452.

It is the duty of the register to deduct and retain in the hands of the assignee a sum sufficient to provide for undetermined claims when in controversy, and for unproven claims when it shall be made to appear probable that, by reason of the distance or for any other good cause, they have not been proved, for it is the duty of the court and not of the creditors to guard the rights of the absent. *Ibid*.

When a receiver has been appointed in a suit pending between the assignee and trustees claiming under a deed of trust for the benefit of creditors, the dividend ought to be made directly to such creditors by the special receiver, as part of the proceedings in such suit, and not by the assignee in bankruptcy as part of the proceedings in bankruptcy, after a transfer to him by the special receiver of the proper sum to be divided. There must be a reference to a master to ascertain and report the proper sum to be divided, and to prepare a schedule of the distributees, and of the amounts of their debts which ought to share in the dividend, and of the rate of dividend, and of the amount to be paid to each creditor. The rate of dividend should not exceed the rate that would be allowed in case all the creditors named in the schedule annexed to the deed of trust had proved their debts in bankruptcy, in addition to such debts proved in bankruptcy as do not appear in such schedule. *Sedgwick v. Place et al.*, 3 B. R. 302.

ACT OF 1867.—(See Duties of Trustees, Act of 1898, § 47 and § 55.)

§ 5093. Like proceedings shall be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of creditors shall then be called by the court, and a final dividend then declared, unless any suit at law or in equity is pending, or unless some other estate or effects of the debtor afterward come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate or effects into money, and within two months after the same shall be so converted, they shall be divided in manner aforesaid. Further dividends shall be made in like manner

as often as occasion requires; and after the third meeting of creditors no further meeting shall be called, unless ordered by the court.

Statute revised — March 2, 1867, ch. 176, § 28, 14 Stat. 530. Prior Statute — April 4, 1800, ch. 19, § 30, 2 Stat. 29.

The court of bankruptcy, for all purposes of the auditing, settlement, and adjustment of the assignee's account, and of distribution, is held provisionally by the register, whose acts are, of course, subject to exception. Full opportunity for exception at the public meeting, or at an adjourned meeting, should be afforded to all parties interested. The assignee should see that proper special notice be given to creditors who have, and to those who have not, proved their debts; and the register should see that this moral and legal duty of the assignee has not been neglected. A bankrupt who allows omissions to occur in these respects may, through neglect of his duty to creditors, lose the right to a discharge. After all due precautions have been thus adopted, exceptions must be taken before the register, and certified by him to the court with his report. Exceptions, unless upon special cause shown, are not afterward received by the court. If no exception is certified, the acts of the register are, in themselves, acts of the court without any formal judgment of confirmation. In all cases, the register should so report as to show particularly how notices and opportunity for exception have been given. *In re Bushey*, 3 B. R. 685.

Rule V makes it the duty of the register to "take proceedings for the declaration and payment of dividends." When the assignee makes an application for a third meeting, the register has the power to make an order requiring the assignee to furnish information in regard to the funds for distribution. It is the duty of the register to ascertain for what purpose the meeting is to be called, and whether there are any funds for distribution. Without such information the register can not be called upon to exercise the discretion devolved upon him by the act upon such an application. When creditors make a request for a meeting, it is the practice to order the assignee to file an account, or otherwise inform the register in regard to the funds in his hands. When this is ascertained, the register exercises a discretion, calling or not calling a meeting, as the facts may warrant. *In re Binninger*, 6 B. R. 193.

The court may restrain the register and the assignee from taking any further steps toward making or paying dividends, with a view to give an opportunity to any person interested to apply to the court on proper papers and on proper notice, to vacate the order of dividend. *In re N. Y. Mail Steamship Co.*, 3 B. R. 280.

ACT OF 1867, § 5094. The assignee shall give such notice to all known creditors, by mail or otherwise, of all meetings, after the first, as may be ordered by the court.

Statute revised — March 2, 1867, ch. 176, § 17, 14 Stat. 524.

The notice to be given by mail is not confined to creditors who have proved their debts. Notice must be sent by mail to all known creditors. Creditors who have proved their debts may not be all the known creditors. *In re William Mills*, 11 B. R. 117; s. c. 7 Ben. 452.

If notice is not sent to a creditor whose name is on the schedule, the meeting must be adjourned and a proper notice sent to him, although he has not proved his debt. *Ibid.*

§ 5095. Any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

Statute revised — March 2, 1867, ch. 176, § 23, 14 Stat. 528. Prior Statute — April 4, 1800, ch. 19, § 6, 2 Stat. 23.

In order to vote for an assignee, the attorney must be an attorney in fact and must be appointed by a power of attorney. *In re Purvis*, 1 B. R. 163; s. c. 1 L. T. B. 19.

One member of a firm may execute a power of attorney authorizing a person to vote for assignee in the name of the firm, and bind all the other members thereby. It is often inconvenient to bring together all the members of a firm to execute a deed of this character. If such was not the law great injury might result to a firm in prosecuting their claims against a debtor, when it is important to proceed without delay. *In re Joseph Barrett*, 2 B. R. 333; s. c. 1 L. T. B. 144; s. c. 1 C. L. N. 202.

When an agent executes a power of attorney in the name of the principal, he must produce legal evidence that he is duly authorized to execute the power of attorney. The certificate of the register before whom the power of attorney was executed, as to the identity of the agent, does not supply the place of such proof. *In re Knoepfel*, 1 B. R. 23; s. c. 1 Ben. 330.

A power of attorney, made before the passage of the bankruptcy act, may authorize an agent to represent his principal in proceedings under it, if its terms are broad enough. A power of attorney authorizing an agent to sign the name of the principal to any paper necessary for the purpose of collecting or receiving any debt due to the principal, authorizes the agent to execute a power of attorney according to Form No. 14. *In re Knoepfel*, 1 B. R. 70; s. c. 1 Ben. 398.

There is no law which requires powers of attorney of this sort to be acknowledged. It is true that the foot-note to Form No. 26 provides that they may be acknowledged, but the supreme court would have prescribed some rule upon the subject, if they had intended to make such action obligatory. The forms are largely advisory. Any duly executed writing which expresses the essential fact of the appointment of the attorney, and the powers confided to him, must be respected by the judge or register. If the supreme court ordered the foot-note to be appended to Form No. 26, it must have been in anticipation that some question of acknowledgment might arise under the municipal law of some particular State; and it is, therefore, pointed out that, in case of acknowledgment, it may be before certain officers. The foot-note is not a rule that

the letter appointing such an attorney must be acknowledged, nor even that it must be a deed. In re H. F. Barnes, Lowell, 560; in re Powell, 2 B. R. 45.

The power of attorney does not require a stamp. In re Myrick, 3 B. R. 154. Contra, see 6 I. R. R. 68.

Where the authority is joint, it must be exercised by all to whom it is given, but Forms Nos. 14 and 26 do not confer a joint authority. In re Phelps, Caldwell & Co., 1 B. R. 525; s. c. 2 L. T. B. 25.

When a letter of attorney addressed to a firm does not authorize either of the partners to act separately, one partner can not act alone and without the co-operation of his copartner. In re Frank, 5 B. R. 194; s. c. 5 Ben. 164; s. c. 2 L. T. B. 188.

A power of attorney, not containing a power of substitution, does not confer any authority upon any other than the person duly constituted agent thereby to act for the creditor, nor can any one else sign the name of such agent to a paper on behalf of the creditor. In re C. N. Palmer, 3 B. R. 301.

Only the bankrupt or a creditor can appear by attorney, unless where a witness is made a party to a new collateral proceeding by being cited to answer for an alleged contempt. In re Fredenburg, 1 B. R. 268; s. c. 2 Ben. 133; in re Feinberg et al., 2 B. R. 475; s. c. 3 Ben. 162.

The register can not, at the instance of the bankrupt, inquire into the authority given to an attorney-at-law who has been admitted to practice in the circuit or district court. In re W. D. Hill, 1 B. R. 16; s. c. 1 Ben. 321.

The statement of an attorney in regard to his authority must be taken as conclusive, unless some proof to the contrary is shown. Alabama R. Co. v. Jones, 5 B. R. 97.

An attorney who has appeared for a defendant can not withdraw his appearance so as to divest the court of jurisdiction, without the consent of the court or prosecuting party. When an appearance is entered by mistake, if the mistake is one of law, the party making it must abide by its consequences. If it is one of fact, the court must pass upon the existence and pertinence of the fact, and allow or refuse the withdrawal upon notice to the prosecuting party. In re Ulrich et al., 3 B. R. 133; s. c. 3 Ben. 355.

When an attorney unreasonably refuses to proceed, the case must proceed without him. In re Hyman, 2 B. R. 333; s. c. 36 How. Pr. 282; s. c. 3 Ben. 28.

**ACT OF 1898, CH. 7, § 65. Declaration and Payment of Dividends.**— (a) Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

(b) The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as

have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order. \* \* \*

(d) Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts.

(e) A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act.

CH. 5, § 47. **Meetings; Dividends; Duties of Trustees.**— (a) Trustees shall respectively \* \* \* (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of creditors; (9) pay dividends within ten days after they are declared by the referees.

ACT OF 1867, § 5096. Preparatory to the final dividend, the assignee shall submit his account to the court and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and the assignee shall, if required by the court, be examined as to the truth of his account, and if it is found correct he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt. The court shall thereupon order a dividend of the estate and effects, or of such part thereof, as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their debts.



Where no assets have come to the hands of the assignee, Form No. 35 is the account. Where assets have come to the hands of the assignee, Forms Nos. 37 and 38 constitute the account. *In re Bellamy*, 1 B. R. 64; s. c. 1 Ben. 590; s. c. 1 L. T. B. 22.

The return is a deposition, and the register is entitled to charge for it as such. *In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.

If the assignee has been discharged without being substituted as a party plaintiff to an action pending at the time of the filing of the petition, the suit may be prosecuted in the name of the bankrupt for the use of whoever may be entitled to the proceeds. *Conner v. Southern Express Co.*, 9 B. R. 138; s. c. 42 Ga. 37.

Where a discharge of an assignee is inadvertently put on file, the district court may order that it stand for naught and direct the assignee to proceed in the discharge of his duties. *Maybin v. Raymond*, 15 B. R. 353; s. c. 4 A. L. T. (N. S.) 21.

When the assignee is discharged, the property that remains undistributed reverts to the bankrupt without a reassignment. *Dewey v. Moyer*, 16 B. R. 1; s. c. 16 N. Y. Supr. 473.

**ACT OF 1898, CH. 7, § 65. Dividends Paid not Affected by Allowing Claims Subsequently.**— (c) The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

**ACT OF 1867, § 5097.** No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter.

Statute revised — March 2, 1867, ch. 176, § 28, 14 Stat. 530. Prior Statute — Aug. 19, 1841, ch. 9, § 10, 5 Stat. 447.

§ 5098. If, by accident, mistake, or other cause, without fault of the assignee, either or both of the second and third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if the meeting had been duly held.

Statute revised — March 2, 1867, ch. 176, § 28, 14 Stat. 530.

§ 5099. The assignee shall be allowed, and may retain out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court. See Act of 1898, *post*, 766.

Statute revised — March 2, 1867, ch. 176, § 28, 14 Stat. 530. Prior Statute — April 4, 1800, ch. 19, § 29, 2 Stat. 29.

**Application for Allowance.**— The assignee is not entitled to compensation beyond his commission without an order of the court. In *re Jas. M. Sawyer*, 14 B. R. 241; s. c. 4 Cent. L. J. 470.

This allowance is in the discretion of the court, and can be made only upon a specific application to the court, and a showing that the disbursements and services for which such allowance is asked were necessary and are reasonable in amount. It is preferable that the hearing should be had before the register, because, having the proceedings all before him, he is better able to judge of the exigencies upon which the necessity for the disbursements and services, and the reasonableness of the amount charged depend. In *re B. B. Noyes*, 6 B. R. 277; in *re Colwell*, 15 B. R. 92.

This allowance can not be made until after the services have been rendered, because, until the court is advised what the services have been, it can not determine whether any particular amount of compensation is or is not reasonable. If there is any money in the hands of the assignee, the allowance may be retained out of the money. If there is no money in the hands of the assignee, the allowance may be secured by withholding the discharge until the bankrupt pays it, on the ground that until then he has not in all things conformed to his duty under the act. In *re Hughes*, 1 B. R. 226; s. c. 2 Ben. 85; s. c. 1 L. T. B. 45; in *re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.

The court will determine whether or not the disbursements are necessary. In *re Noakes*, 1 B. R. 592.

The assignee is not at liberty to charge the assets of the estate in his hands for professional and clerical services rendered him in the execution of his trust until the same shall have been first duly allowed by the court. In *re B. B. Noyes*, 6 B. R. 277.

The assignee may apply to the court, in the first instance, for authority to employ professional or clerical assistance, but in such case the court could do but little more than grant such authority in general terms, leaving the instances in and to which such assistance may be employed largely to the discretion of the assignee, as emergencies may arise making such assistance necessary. Such authority the assignee already possesses under his general powers, subject, however, to the control of the court. Such power must be used by him cautiously, and in the exercise of a sound discretion, and with the understanding that any abuse of it will be corrected by the court when applied to for authority to charge the estate for such assistance. *Ibid*.

It would be difficult and impracticable to prescribe any general rule defining the circumstances under which and the extent to which an

assignee is at liberty to charge the assets of the estate in his hands for professional and clerical services in the execution of his trust. This must be left to be decided in each individual case according to its peculiar exigencies. *Ibid.*

When the assignee desires to pay for any professional or clerical assistance out of funds in his hands belonging to the estate, before submitting his final account, he should apply to court for the allowance of the same, or the person rendering the service may himself apply. In either case the assignee would be at liberty to charge the amount allowed to the estate at once, on payment of the same. If no such application is made, or if he has incurred liabilities, or made disbursements for such assistance, or otherwise, in regard to which no allowance has been made, or if he makes a claim other than his commissions for services, then the assignee must accompany his final account with a separate and distinct application for an allowance of the same, and submit to such examination, and furnish such proofs as may be required touching the necessity of such disbursements and services and the reasonableness of the amounts charged. *Ibid.*

The application for an allowance for professional or clerical assistance, or disbursements, or personal services, should contain a brief statement of the circumstances out of which the necessity for the disbursements, and the professional or clerical assistance, and the assignee's own services arose, and from which the reasonableness of the amounts claimed therefor may appear, and should be verified by the assignee. *Ibid.*

If the assignee in asking for authority to employ an attorney to prosecute a pending action omits to disclose to the court the fact that an attorney was already employed by the bankrupt to prosecute it upon a contingent fee, the employment of an attorney who knows this fact is not binding upon the court, and such attorney is only entitled to a reasonable compensation. *Maybin v. Raymond*, 15 B. R. 353; s. c. 4 A. L. T. (N. S.) 21.

When the assignee intends to claim a compensation beyond the fees allowed to him, he should give notice thereof in the notices for the meeting at which the account is to be considered. *In re Colwell*, 15 B. R. 92.

If the application accompanies the final account, it will be laid before the creditors at the same time, and if they assent, or fail to object to the same, and the items and amounts appear to be just and reasonable, all further inquiry may be dispensed with. *In re B. B. Noyes*, 6 B. R. 277.

**What May be Allowed.**—An allowance by the day is a convenient mode of getting at a proper allowance for the services of an assignee, but it is hardly a fair mode where the time charged for is very large, and the estate very small. Five dollars is the maximum, but this should not be allowed where the time charged for is unusually large and the estate small. The assignee should also be held to the exercise of a reasonable judgment as to the amount of time to be devoted to the execution of the trust. *In re Jones*, 9 B. R. 491.

The following decisions have been made in regard to fees and expenses of assignees. The abbreviations used are as follows: a, allowed; d, disallowed; r, reduced:

Drafting certificates of exempted property.....	\$5 00	} r to \$5 00
Drafting acceptance and notice of appointment..	8 00	
Drafting petition for sale of property .....	5 00	
Publishing notice of appointment .....	6 00	a
Advertising sale of property .....	1 50	a
Recording assignment .....	1 25	a
Stationery, postage, etc. ....	1 50	a
Writing and delivering deed to purchaser.....	5 00	d
Commission at the rate of 5 per cent.....	66 56	a
For each day employed in selling property, collecting accounts, examining papers, and preparing advertisements .....	7 00	r to proper comp.
Services of auctioneer .....	2 00	d
Attorney's fees .....	proper compensation.	

In re Davenport, 3 B. R. 77; s. c. 2 L. T. B. 136; in re Pegues, 3 B. R. 80; s. c. 2 L. T. B. 136; in re Tulley, 3 B. R. 82; s. c. 2 L. T. B. 137.

The computation of the amount due to printers for advertising a sale of real estate should be in accordance with the following rates:

Each square of eight lines, first time .....	\$1 00
Each subsequent insertion, per square .....	50

In re Wm. Downing, 3 B. R. 741, 748; s. c. 1 Dillon, 33; s. c. 1 L. T. B. 207.

The assignee can not employ an auctioneer without first obtaining an order authorizing such employment. In re Pegues, 3 B. R. 80; s. c. 2 L. T. B. 136; in re Tulley, 3 B. R. 82; s. c. 2 L. T. B. 137.

The assignee must make the necessity for the aid of an auctioneer and the reasonableness of the amount paid therefor to appear before he can have a charge for such services allowed. In re Sweet et al., 9 B. R. 48; in re Pegues, 3 B. R. 80; s. c. 2 L. T. B. 136; in re Tulley, 3 B. R. 82; s. c. 2 L. T. B. 137.

Fees for the assistance of an attorney will not be allowed without the most satisfactory evidence going to show the necessity for legal aid on the part of the assignee, and the actual rendition of the services charged for. In re Davenport, 3 B. R. 77; s. c. 2 L. T. B. 136; in re Pegues, 3 B. R. 80; s. c. 2 L. T. B. 136; in re Tulley, 3 B. R. 82; s. c. 2 L. T. B. 137; in re Warshing, 5 B. R. 350; in re Colwell, 15 B. R. 92.

The compensation of the assignee's attorney must be reasonable and proportioned to the value of the estate. In re Priscilla G. Drake, 14 B. R. 150.

As a general rule, no charge for professional services of counsel can be allowed against the assets in the hands of the assignee for payment in full, and as expenses of the assignee in the administration of his trust, which were rendered prior to the appointment of the assignee. Under special circumstances, services may be included which are rendered as far back as the adjudication of bankruptcy. In re New York Mail Steamship Co., 2 B. R. 554.

The assignee should pay all reasonable and necessary expenses incurred after the date of the filing of the petition, because his title relates to that time, and he is the debtor by relation for all such expenses. The bankrupt is bound to see that his estate is kept together, and preserved for the assignee, and all the necessary charges for the fulfillment of his duty must be allowed him. *In re Fortune*, 2 B. R. 662; s. c. *Lowell*, 306.

Assignees, except in cases of fraud, are affected with all the equities which would affect the bankrupt, if he were asserting his rights and interests in the property. But this principle can only operate on the title as it stood when the property passed from the bankrupt to the assignee, and not to any rights attempted to be obtained subsequently. Advances and expenditures made to discharge liens, and preserve and benefit the estate after the commencement of proceedings in bankruptcy, by a party whose relation to the property justified such advances and expenditures, are an equitable claim and lien upon the estate. *In re T. B. Gregg*, 3 B. R. 529; s. c. 1 L. T. B. 208.

The bankruptcy court may, in the exercise of its equitable jurisdiction, require the assignee to pay such charges as appear to have benefited the estate in his hands, though incurred before the petition was filed, and not protected by any absolute lien. Equitably considered, the assignee receives the benefit and should sustain the burden. *In re Fortune*, 2 B. R. 662; s. c. *Lowell*, 306.

A party who is employed in the prosecution of a claim for the debtor, after the filing of an involuntary petition, and before the filing of the voluntary petition under which the proceedings are held, is entitled to priority out of the proceeds of such claim, when such employment was made with the consent of the creditors. *In re Nounnan & Co.*, 6 B. R. 579; s. c. 4 L. T. B. 228; s. c. 1 *Utah Ter.* 44.

The claim of a referee rests in contract between himself and the parties before him. If he decides in favor of the defendant, who was declared bankrupt after the taking of the testimony, but prior to the rendering of the decision, his claim for fees is a debt which may be proved in bankruptcy. Such claim is not entitled to priority, if the assignee has not become a party to the suit. Perhaps the assignee might be justified in taking up the report and docketing judgment. And in such case, the payment of the referee's fees might be allowed as a necessary disbursement. *In re Louis Rosey*, 43 *How. Pr.* 471.

The estate is liable for the keeping of cattle from the institution of bankruptcy proceedings. *In re J. C. Mitchell*, 8 B. R. 47; s. c. 5 C. L. N. 271; *Moran v. Bogert*, 14 B. R. 393; s. c. 10 N. Y. 603; s. c. 16 *Abb. Pr. (N. S.)* 303.

The sheriff has no claim for services rendered under executions issued after the filing of the petition in bankruptcy. *Platt v. Stewart*, 11 B. R. 191.

The sheriff may be allowed a compensation, not exceeding his legal fees, for services rendered under an execution issued prior to the filing of the petition in bankruptcy, although the judgment and execution is not a lien. *Ibid.*

If the bankrupt was interested in the defense of a suit, and agreed to pay one-half of the expense, although his share was only one-tenth, and the assignee with knowledge of the contract appears and continues the defense, he will be assumed to have acquiesced in the terms, and the estate will be charged with that proportion of the expense. *In re Samuel H. Babcock*, 1 W. & M. 26.

The usual and ordinary expenditures made in the delivery of the cargo of a vessel owned by the bankrupt in order to enable her to free herself from liability on her existing contract of affreightment, and to collect her freight, are entitled to priority out of the freight and the proceeds of the vessel coming into the hands of the assignee. *The Trimountain*, 5 Ben. 240.

The assignee may allow the bankrupt a reasonable sum for taking charge of the property prior to his appointment. *In re Benjamin B. Grant*, 2 Story, 312.

The liability of the assignee for rent depends on whether he has accepted the lease or not. Mere neglect by the assignee is of no importance, for in the absence of a positive acceptance he is not liable. *In re Washburn*, 11 B. R. 66.

Rent for the use of premises to store goods of the bankrupt, from the time of the commencement of proceedings in bankruptcy to the date of surrender, should be paid by the assignee and charged as a part of his expenses. *In re Walton*, 1 B. R. 557; *in re Appold*, note, 1 B. R. 621; s. c. 6 Phila. 469; s. c. 1 L. T. B. 83; *Walker v. Barton*, 3 B. R. 265; *in re Merrifield*, 3 B. R. 98; *in re Laurie et al.*, 4 B. R. 32; s. c. Lowell, 404; *Buckner v. Jewell*, 14 B. R. 286; s. c. 2 Woods, 220. *Contra*, *in re McGrath & Hunt*, 5 B. R. 254; s. c. 5 Ben. 183.

As soon as the marshal takes possession, it is the duty of the landlord to apply to the court to have the goods removed and the premises vacated by the marshal. *In re McGrath & Hunt*, 5 B. R. 254; s. c. 5 Ben. 183.

Where the assignee occupies the premises after the commencement of the proceedings in bankruptcy, the landlord is entitled to be paid out of the proceeds of the goods on the premises, whether they are sufficient to pay the other expenses of the proceedings or not. *Buckner v. Jewell*, 14 B. R. 286; s. c. 2 Woods, 220.

Compensation to the bankrupt for extraordinary services rendered in order to make the property available can only be allowed as a matter of grace by the creditors. *In re Barnes Brother & Herron*, 1 W. N. 21.

Expenses incurred by the assignee in putting property into a salable condition may be allowed. *Foster v. Ames*, 2 B. R. 455; s. c. Lowell, 313.

Courts deal with assignees as the representatives of the bankrupt's estate from the commencement of proceedings in bankruptcy, and in the settlement it is their duty to look after the payment of all proper expenses incurred subsequent to that date. Before they consent to a dividend to the creditors, they should retain under their own control a sufficient sum of the assets to cover expenses and costs, and their failure so to do — such failure being of their own wrong, or the result of their own neg-

lect — can not be made the basis of an appeal to the court to relieve them from the consequences. If they do not pay such expenses, an order may be passed requiring the payment of them, even after a dividend of all the assets has been declared and paid. *In re Dunham & Hawks*, 7 Phila. 611.

When the sheriff, by an amicable arrangement, is allowed to remain in possession of goods duly attached after the dissolution of the attachment, the expenses so incurred should be allowed and paid in full as incident to the settlement of the estate. *In re David B. Williams*, 2 B. R. 229; s. c. 1 L. T. B. 107, 113; s. c. 3 A. L. Rev. 374.

No expenditure by a third party can be allowed unless it is shown that it was necessary, or resulted in a benefit to the estate. *In re George S. Ward*, 9 B. R. 349.

A State court has no jurisdiction to direct that a judgment in an action against the assignee shall be paid in full out of the estate. *In re Central Bank of Brooklyn*, 12 B. R. 286; s. c. 7 C. L. N. 871.

An agreement by the creditors to pay a person a certain sum in addition to his legal fees if he will act as assignee is illegal and void. *Cowing v. Altman*, 1 T. & C. 494; s. c. 12 N. Y. Supr. 556.

No State can tax the funds belonging to a bankrupt's estate in the hands of the assignee. *In re John K. Booth*, 14 B. R. 232.

ACT OF 1898, CH. 5, § 48. **Compensation of Trustees.**—(a) Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars.

(b) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

(c) The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

ACT OF 1867, § 5100. In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case on all moneys received and paid out by him therein, for any sum not ex-

ceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars. If, at any time, there is not in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him.

Statute revised — March 2, 1867, ch. 176, § 28, 14 Stat. 430.

This clause does not conflict with the provision in the preceding section, except so far, perhaps, as to limit the allowance for receiving and paying out money to a certain per centum, graduated by the amount. *In re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.

The commission of five per cent. can only be allowed on the amount of debt canceled, and not on the amount of debt proved. *In re Davenport*, 3 B. R. 77; s. c. 2 L. T. B. 136.

When the assignee resigns, he may be allowed his commissions on the moneys received and paid, or to be paid. But it would not be just or reasonable to allow him commissions based upon the speculative idea that possibly, if continued in office and permitted, for the mere purpose of earning commissions, to litigate the validity of a mortgage against the will of all who are interested in that question, he might establish its invalidity. The bankruptcy law was not enacted for the purpose of enabling an assignee to earn fees by unnecessary litigation, where no interest of the parties to be affected thereby requires it, and where, on the contrary, every beneficial interest involved therein forbids it. *In re Sacchi*, 6 B. R. 497; s. c. 43 How. Pr. 250.

When the register takes possession of property and sells it under a special order of court, he may receive a commission similar to that allowed to assignees under this section. *In re Loder Brothers*, 2 B. R. 517; s. c. 3 Ben. 211; s. c. 1 L. T. B. 159.

The necessary funds for the performance of a duty are to be advanced by the party for whom the services are to be performed. *In re Hughes*, 1 B. R. 226; s. c. 2 Ben. 85; s. c. 1 L. T. B. 45.

ACT OF 1898, CH. 7, \* \* \* § 63. **Debts which May be Proved.**—(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against



an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

In ascertaining the validity of the docket entry of a judgment, the whole entry is to be looked at, and if from the whole the amount and date of the judgment, the parties and the court in which it was rendered appear, the entry is sufficient. *In re Hamilton Boyd*, 16 B. R. 207.

While a judgment record can not be resorted to in order to supply omissions in the docket entry, it may be examined to test the validity of such entry. *Ibid.*

No debt can be proved on which an action could not be maintained against the bankrupt in the State where the petition is filed, in case bankruptcy proceedings were not instituted. *In re Doty*, 16 B. R. 202.

A judgment against the bankrupt existing at time his petition is filed, whether founded upon contract or not, is a provable debt. *Howland v. Carron*, 16 B. R. 372.

Where a firm, which has indorsed a note of one of the partners, becomes bankrupt before maturity of such note, protest and notice to firm of its dishonor not necessary in order to prove it against the joint assets. *Ex parte Russell*, *In re Paul & Son*, 16 B. R. 476.

Holder of bill or note may prove it in full against the party primarily liable upon it, notwithstanding he may have received a part or all of it from a surety or quasi surety, but must give credit upon his claims for any property of the principal which came into his hands through a composition with such surety, who in this case was a factor of the principal. *Ex parte Harris et al.*, *In re Cochrane, Jr.*, 16 B. R. 432.

Entries of accommodation notes in the books of the bankrupt against the payee will not estop the bankrupt nor his trustee from disputing the claim of the holder of such note. *In re Dodge*, 17 B. R. 504.

Making notes payable to another party has never been held such a representation as estops the maker from showing that they were accommodation paper, even in favor of one to whom the payee has represented them to be business paper and who took them in good faith on such representations. *Ibid.*

The notes in this case were held usurious and void and were governed by the law of New York, where they were executed, and where they were discounted by the Connecticut firm, which paid for same by sending check on a New York bank. *Ibid*.

The trustee is not estopped from disputing the claim of the holder of the notes by reason of said trustee's having proved them against the estate of the payee in bankruptcy, when the holder has not, upon the faith thereof, parted with his money or changed his position as to such notes. *Ibid*.

Where one member of a firm makes representations to the purchaser of commercial paper bearing the firm name, to effect that it is business paper, the firm or its assignee in bankruptcy is estopped from setting up that it is accommodation paper and void for usury. *In re Many & Marshall*, 17 B. R. 514.

Where an assignee moves to expunge a claim on ground of usury, alleging that the promissory note on which the claim is founded was accommodation paper, and took its inception in hands of present holder, who obtained it at discount of more than lawful rate of interest. Held, that it must be shown clearly that the note was accommodation paper. *Ibid*.

Where all members of one firm are partners of another firm, they can not prove its debt against the latter. *In re Savage*, 16 B. R. 368.

Evidence is always admissible between principal and surety to show what their equitable rights toward each other are. *In re May & Co.*, 17 B. R. 192.

The bankrupts made a certain note for \$6,000 for accommodation of one H., who indorsed and procured its discount at the bank. The bank, before note came due, had knowledge of purpose for which it was given. The bank discounted H.'s note for \$5,000, and took his check for \$6,000. The last note not being indorsed the bank held the old note, and sought to prove it against the estate of bankrupts. Held, the bankrupts were sureties, and were discharged by extension of time to H. without their consent. *The Valley Nat. Bk. v. Meyers*, 17 B. R. 257.

It seems that notes given by factors, by way of advances to their principals, on credit of goods consigned, are business paper and not accommodation paper. *In re Many & Marshall*, 17 B. R. 514.

Indorser of a note is, in any event, liable to his indorsee only for amount actually paid by the indorsee, with lawful interest thereon, and not for the face value of note. *Ibid*.

Claim of one of the creditors was upon two notes given by the bankrupt to a firm of which the claimant was a member, for debt due to the firm secured by a pledge of stock. The firm afterward surrendered to the bankrupt a large number of notes, and signed an agreement to take up and surrender others, including the ones in question, and received from the bankrupt a cash payment, which, it was agreed, with the stock held by them, should be taken in satisfaction of the debt. Held, that the notes were paid. *In re Ford & Co.*, 18 B. R. 426.

The statute of limitations of the State where the bankrupt resides applies to the proof of debts against his estate; and such statute continues to run after adjudication in bankruptcy, and, therefore, no claim can be proved or enforced against such estate unless an action could be maintained thereon in the courts of such State. *Nicholas v. Murray*, 18 B. R. 469.

But a debt against which the statute of limitations has run, but which is included in the debtor's schedules, is provable in bankruptcy. In *re Hertzog*, 18 B. R. 526.

In an action brought by the bankrupt against one B., the defendants interposed a counterclaim. The bankrupt having been adjudicated before the trial of the action, B. offered no evidence in support of his defense, and judgment was rendered against him. Held, that he was not precluded from proving his claim in the bankruptcy proceedings. In *re The People's Safe Dep., etc., Inst.*, 18 B. R. 493.

Bankrupts drew drafts upon their correspondents (who accepted same) against consignments which bankrupts agreed to, but failed to make. After dishonor of the drafts, the holder received from acceptor sixty per cent. of the amount due on them in full release of all claims against such acceptors, but without prejudice to his rights against bankrupt. Held, that the holder of the drafts had a right to prove against the bankrupts for the whole amount of the drafts. In *re Baxter & Ralston*, 18 B. R. 497.

The bankrupt had made two subscriptions to an endowment fund and a building fund of Denison University. After the second subscription the bankrupt executed and delivered to the university a note secured by mortgage, the amount being made up of his former note, the balance due on his second subscription, and money borrowed of the university. In a proceeding by the assignee to settle and declare the amount and priority of liens, and for a sale of the bankrupt's property, a supplementary petition was filed asking that so much of the university's claim as was made up of voluntary gifts of the bankrupt be set aside. Held, that the claim was valid; that if it was founded upon the original subscription it would be good; but in this case the original subscription had been settled, satisfied and paid by the notes, and that after such changes and settlements every presumption is in favor of the transaction, and the court will not go behind it. *Sturgis v. Colby*, 18 B. R. 168.

Where an attachment lien falls in consequence of proceedings in bankruptcy, the attaching creditor is not entitled to have his costs allowed and paid out of the bankrupt's estate unless it is clearly shown that his design was to employ the attachment in aid of bankruptcy proceedings, and that the creditors generally were benefited thereby. In *re Irons & Coon*, 18 B. R. 95.

The bankrupt, prior to commencement of the proceedings, purchased goods of one Q., and gave therefor his notes secured by mortgage on the goods, under an agreement to sell the goods and apply the proceeds to the payment of the notes, even before maturity, if sales were brisk enough. He sold part of the goods, and appropriated the proceeds to his own use, and the remainder came into the hands of the assignee. Held, that the bankrupt was in effect agent for sale of the goods; that the goods remain-

ing unsold should go to Q.; and that he should be allowed to prove as an unsecured creditor for the goods sold by the bankrupt and misappropriated, on surrendering the notes and mortgage. *Overman, Assignee, v. Quick*, 17 B. R. 235.

A contract for future delivery of personal property, which the seller has not when the contract is made, nor any means of getting it, is not void for illegality. *Clark, Assignee, v. Foss*, 17 B. R. 261.

Secret intention of one of the parties, uncommunicated to the other, not to fulfill his contract, is not enough to make the transaction illegal. The intent that it should be a mere betting on the market, without any expectation of actual performance, must be mutual and constitute an integral part of the real contract, in order to vitiate it. *Ibid.*

If contracts were valid in their inception, and not tainted with any gambling intent or device, a subsequent mutual settlement by the parties, which took the place of actual performance, can not have the retroactive effect of making them void for illegality. *Ibid.*

A bankrupt corporation occupied a store under a lease for a term of years, at a yearly stipulated rent. A petition was filed against the corporation, and afterward an assignee appointed, who about five months after date of filing of petition took possession of the goods and removed them from the store. He never had actual or constructive possession of the store, and no sales were made therein. The landlord claims for rent of premises from time of the filing of the petition up to time of removal by assignee. Held, that the assignee never became assignee of the lease, and that the landlord can only claim as against the estate for the use and occupation of the premises as a place of storage or safe-keeping, and the court fixed as a reasonable sum for same an amount about one-fourth that claimed by the bankrupt. *In re Lucius Hart Mfg. Co.*, 17 B. R. 459.

A provable claim which has not been proved may be prosecuted to final judgment in an action against bankrupt, if assignee does not intervene and no motion for a stay of proceedings is made. *Holland v. Martin*, 18 B. R. 359.

Claim for alimony is not a provable debt, whether accruing before or subsequent to commencement of bankruptcy proceedings, and a proceeding to enforce its payment can not properly be stayed by a bankruptcy court. *In re Lachemeyer*, 18 B. R. 270.

Judgment recovered pending bankruptcy proceeding, in an action previously begun on a provable debt, is itself provable, and a creditor having such a judgment has an interest in the question of discharge, and a right to be heard thereon. *In re Stansfield*, 16 B. R. 268.

Interest upon a judgment obtained in an action prosecuted by leave of the court is allowable. *In re Bousfield & Poole Mfg. Co.*, 17 B. R. 153.

A judgment obtained in such a case is valid, though assignee is not made a party. *Ibid.*

A claim by retired partners for unliquidated damages, by reason of their liability under provision of a lease to the firm, that in case of failure to perform the lessors may re-enter and relet the premises, at the risk of

the lessees, who should remain liable for the rent and credited with sums actually realized, can not be proved against estate of their former partner. *Ex parte Lake et al., in re Whiting et al.*, 16 B. R. 497.

It is no objection to a proof that a court or jury may find difficulty in assessing damages for a breach of an absolutely broken contract. So, also, as to contingent debts, where the contingency happens before the close of the bankruptcy. *Ex parte Pollard*, 17 B. R. 228.

Where a contract of employment was to run for ten years, and the parties bound themselves in the sum of \$10,000 by way of liquidated damages, and it appears that in a prior contract the sum had been called both a penalty and liquidated damages, *Held*, that it was a penalty. *Ibid*.

**ACT OF 1898, CH. 7, § 64. Debts which Have Priority.**—(a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

(b) The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

(c) In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit,

in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

Funds in hands of assignee may be taxed by the State. In *re Mitchell*, *ex parte Sherwin*, 16 B. R. 535.

A creditor, who is entitled to preference, can only have a priority in payment out of what assets the debtor has which would go to this assignee, and where it appears that there are no assets of any value he can not demand that his claim shall be paid in full before confirmation of a composition, or that such composition shall be subject to his debt. But he may examine the debtor and other witnesses in the composition proceedings to show that the debtor has other assets. In *re Chamberlain*, 17 B. R. 49.

Under the law of 1867, debts due the United States and the States were entitled to priority. What are such debts? In *re Chamberlain*, 17 B. R. 49; in *re Bousfield & Poole Mfg. Co.*, 17 B. R. 153; in *re Miller*, 17 B. R. 402.

Where an adjudication has been had, and an assignee under the State law has surrendered the estate in his hands, the rights of creditors are to be determined by the court under the provisions of the bankruptcy law, not under those of the State law. In *re Bousfield & Poole Mfg. Co.*, 17 B. R. 153.

Where property taken by assignee is charged with a lien, the reasonable cost of keeping and disposing of it, including the assignee's fees (law of 1867), should be charged upon it. No charge can be allowed for services of an auctioneer, unless it be shown that such services were necessary; nor can such fund be charged with attorney's fees for services rendered to assignee in a contest with the lienor respecting such property. In *re Peabody*, 16 B. R. 343.

Under the law of 1867, it was held that where an insolvent who has made a general assignment for the benefit of creditors is afterward adjudged bankrupt, the assignee under the assignment is entitled to his disbursements legitimately made in the execution of this trust, but is not entitled to priority as to his compensation as such assignee, nor as to attorney's fees incurred in connection with the assignment. As to such items he stands in the same position as other creditors, and must prove his claim. In *re Geo. Lains*, 16 B. R. 168.

Petitioners had prior to the commencement of proceedings delivered to the bankrupt certain wool which he was to manufacture into cloth for them. The assignee, under direction of the court, completed the manufacture of the cloth and sold it. Petitioners demanded of the assignee the unfinished cloth and yarn and wool belonging to them, offering to pay for the labor and materials expended thereon. Upon refusal, they brought suit against the assignee in trover and recovered judgment for their damages, with interest and costs. The recovery was afterward limited to the amount realized by the assignee on the sale, less the cost of the labor and material put into the goods by the bankrupt and the assignee. The assets

being insufficient to pay this judgment in full, after payment of the fees, costs and expenses of the assignee incurred in course of the proceedings and in his administration of the estate, petitioners asked that the judgment be paid in full, or so far as the assets would go toward its payment. Held, that petitioners, having elected to sue in trover for damages, waived any claim they might have had to the moneys in the assignee's hands as their own moneys, and were not entitled to priority over those expenses which are expressly preferred by the statute. In re Oberhoffer, 17 B. R. 546.

A claim by a landlord for use and occupation of premises by the marshal for keeping and storing the goods, and the costs on reference to adjust the amount of claim, are costs of administration, to be paid in full if the assets are sufficient; if not, to be paid pro rata with all other expenses of administration of the same class. In re Hoagland, 18 B. R. 530.

Costs of a claimant upon a reference to have the claim declared and enforced are to be paid out of the balance remaining after payment of all the expenses of administration. Ibid.

The assignee can not pay a claim for use and occupation of premises without an order of the court, and without ascertaining whether the assets are sufficient to discharge all the expenses of administration of the same class. Ibid.

Where there are debts due workmen, which are privileged, the assignee has no right to waste their money in litigation for supposed benefit of general creditors. In re J. M. Sawyer, 16 B. R. 460.

If the general creditors consent, the assignee should pay the privileged debts as soon as he realizes sufficient money for that purpose. Ibid.

Claimant had been employed by the bankrupts for the term of one year, but was discharged at expiration of six months, and for a long time thereafter was unable to procure employment. He was paid for the time he actually worked. He was not entitled to priority in the payment of the sum claimed by him as wages for the time he was unemployed. In re Perrear & La Croix, 17 B. R. 461.

A claim of the landlord for rent for which, by the laws of the State, he had a lien on goods which have been seized by the marshal, is a preferred claim so far as the proceeds of such goods will go. In re Hoagland, 18 B. R. 530.

ACT OF 1867, § 5101. In the order for a dividend, the following claims shall be entitled to priority, and to be first paid in full, in the following order:

First. The fees, costs, (a) and expenses of suits, and of the several proceedings in bankruptcy under this Title, and for the custody of property, as herein provided.

Second. All debts due (b) to the United States, and all taxes and assessments under the laws thereof.

Third. All debts due to the State (c) in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof.

Fourth. Wages (d) due to any operative, clerk, or house-servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

Fifth. All debts due to any persons (e) who, by the laws of the United States, are, or may be, entitled to a priority in like manner as if the provisions of this Title had not been adopted. But nothing contained in this Title shall interfere with the assessment and collection of taxes by the authority of the United States or any State.

Statute revised — March 2, 1867, ch. 176, § 28, 14 Stat. 530. Prior Statutes — April 4, 1800, ch. 19, § 62, 2 Stat. 36; Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

**Costs and Expenses in Voluntary Bankruptcy.**—(a) The fees, costs, and expenses named in the first of the five subdivisions are those incurred by and due to the register, clerk, assignee, and marshal, and not those incurred by the bankrupt, or due to his attorney in the proceedings for services or disbursements in connection with such proceedings in voluntary bankruptcy. In re Heirschberg, 1 B. R. 642; s. c. 2 Ben. 466; in re New Lamp Chimney Co., 2 A. L. J. 343; in re Hale & Wiggins, 5 Law Rep. 403; in re R. Frederick Gies, 12 B. R. 179; s. c. 7 C. L. N. 379. Contra, Kennedy et al., 20 Pitts. L. J. 193.

Money advanced as security for the fees of the register, marshal, and clerk is not to be refunded to the bankrupt. It is part of the bankrupt's estate, and should be credited to the assignee. Anon., 1 B. R. 123.

The bankrupt's attorney may be allowed the money advanced to pay the marshal for his fees in giving the notices required by law. In re R. Frederick Gies, 12 B. R. 179; s. c. 7 C. L. N. 379.

An application by the attorney for the bankrupt to have certain sums advanced as costs in the case refunded to him out of the estate, should be by petition. In re Myron Rosenberg, 3 B. R. 73.

In cases of voluntary bankruptcy, the docket fee of \$20 to the attorney of the successful party is not allowable. Gordon, McMillan & Co. v. Scott & Allen, 2 B. R. 86; s. c. 1 L. T. B. 99; s. c. 7 A. L. Reg. 749.

An attorney is a general creditor in respect to services rendered in the preparation of the petition and schedules, and consultation therefor, and must prove his debt in the usual form, and take his dividend in concurrence with the other creditors of the bankrupt. In re Jaycox & Green, 7 B. R. 140.

In order to justify an order that the assignee pay the claim of an attorney for services rendered to the bankrupt after the adjudication, it must be clearly shown that the alleged services were properly and necessarily rendered for the purpose of benefiting or preserving the estate of the



bankrupt in the interest of the general creditors, and not in the interest of any creditor or class of creditors. It is the duty of the bankrupt to see that his property is preserved until the appointment of an assignee, and if it is necessary that other persons should render similar services, the extent and value and necessity of such services should be clearly shown. *Ibid.*

If there is no satisfactory proof upon which the court can fix and allow any specific sum for services rendered by an attorney after the adjudication, the petition may be dismissed, without prejudice to any subsequent application for payment for services necessarily rendered in protecting the estate of the bankrupt. *Ibid.*

All the costs of the whole proceedings in bankruptcy are not to be paid before the proceeds of the sale of property subject to a lien can be applied toward the payment of the lien. The only costs that are entitled to priority out of that fund are the costs incurred in enforcing the lien. In *re Hambright*, 2 B. R. 498; s. c. 2 L. T. B. 61; s. c. 1 C. L. N. 201; in *re Whitehead*, 2 B. R. 599; in *re Davenport*, 3 B. R. 77; s. c. 2 L. T. B. 136.

No fee can be allowed out of the fund to the counsel of a lien creditor for services rendered in supporting the lien against the assignee. In *re Hope Mining Co.*, 2 Saw. 351.

**Costs and Expenses in Involuntary Bankruptcy.**—The reasonable expenses incurred by the petitioning creditor in the prosecution of the petition may be allowed out of the fund. In *re Mittedorfer*, 3 B. R. 1; s. c. *Chase*, 288; in *re Schwab*, 2 B. R. 488; s. c. 3 Ben. 231; s. c. 2 L. T. B. 106; in *re Geo. Chandler*, 2 Mich. Law, 8.

In involuntary proceedings, counsel fees for the attorneys of the petitioning creditors may be allowed out of the estate. The creditors who seek to share in the estate must bear their due proportion of the costs. Section 824 is only intended to reach taxable costs, and may have its full effect without being construed to take away the power from the court to allow counsel fees to successful creditors in appropriate cases out of funds that have been gained by their diligence. Even since the passage of that statute, counsel fees for all parties have, in some cases, been allowed out of the fund. Without such an allowance, there can not be such a due distribution of the assets as is provided for by the statute. In *re Daniel Williams*, 2 B. R. 83; in *re O'Hara*, 1 L. T. B. 123; s. c. 8 A. L. Reg. 113; s. c. 16 Pitts. L. J. 134; in *re Waite & Crocker*, 2 B. R. 452; s. c. *Lowell*, 321; s. c. 2 L. T. B. 77; in *re Schwab*, 2 B. R. 488; s. c. 3 Ben. 231; s. c. 2 L. T. B. 106; in *re Mittedorfer et al.*, 3 B. R. 1; s. c. *Chase*, 288; in *re New York Mail Steamship Co.*, 2 B. R. 554; s. c. 3 B. R. 627; s. c. 7 Blatch. 178; in *re Eugene Comstock*, 9 B. R. 88; in *re John G. King*, 4 Biss. 319; in *re Geo. Chandler*, 2 Mich. Law, 8.

What are reasonable expenses must depend upon the circumstances of each case. The expression has reference to necessary disbursements made in connection with the steps proper to be taken by the petitioning creditor preliminary to, and attendant upon, the adjudication of bankruptcy. No allowance can be made to the petitioning creditor for his time and services. In *re Mead & Co.*, 8 Phila. 174; in *re John G. King*, 4 Biss. 319.

Allowance for counsel fees should be guarded by the most cautious regard for the rights and interests of the creditors at large, lest, under the form of necessary expenses, undue liberality to counsel should be sanctioned in reduction of the fund. In *re New York Mail Steamship Co.*, 3 B. R. 627; s. c. 7 Blatch. 178; *Triplett v. Hanley*, 1 Dillon, 217.

Where the estate is small, charges for services, whether professional or otherwise, will be limited to what the court considers a bare compensation. In *re Jones*, 9 B. R. 491.

Fifty dollars may be allowed to the attorney for the petitioning creditor, and twenty-five dollars for the necessary preliminary investigations. *Ibid.*

The allowance should only be for services rendered by the attorney in proceedings for the common benefit of all the creditors. Where the petitioning creditor attempts, after adjudication, to exclude other creditors from participating either in the choice of assignee, or in the assets of the estate, and fails, the allowance will be refused. The question is not whether the attorney has acted with a proper sense of delicacy and honor, but whether the petitioning creditor has incurred a liability in instituting proceedings for the pecuniary advantage of the other creditors. A reasonable fee for filing the petition and obtaining the order of adjudication should be allowed. When there is no denial and no contest, \$60 is a reasonable compensation for such services. In *re Mead & Co.*, 8 Phila. 174.

One thousand dollars has been considered too extravagant, and the allowance refused, unless the assignee and the bankrupt, and all the creditors who had proved their debts, would assent thereto in writing. In *re Sanger & Scott*, 5 B. R. 54.

After adjudication the petitioning creditor has no preference over any other creditor as to the allowance of expenses incurred by him in connection with the proceedings. In *re Eugene Comstock et al.*, 9 B. R. 88.

The expenses of a creditor in attending meetings of creditors to vote for assignee or otherwise are not allowed as charges against the estate. In *re Geo. S. Ward*, 9 B. R. 349.

The register can not entertain an application for such an allowance. There must be a petition to the court by the party, setting out the facts and asking the relief desired. In *re Dibblee et al.*, 3 B. R. 754; s. c. 4 Ben. 137.

The petition may be filed with the register, and upon proper notice to the assignee, the register may take such testimony as may be offered on both sides, and then, if desired by either party, may certify the whole matter to the judge for decision. The register has the power to take the testimony without a special order from the judge. In *re Julius A. Robinson*, 43 How. Pr. 25.

An opportunity should be allowed to the assignee to examine and contest the claim or any items thereof. In *re Mittledorfer et al.*, 3 B. R. 1; s. c. Chase, 288; in *re Henry B. Montgomery*, 3 B. R. 426; s. c. 3 Ben. 364; in *re Hale & Wiggins*, 5 Law Rep. 403.

Only the fees for two counsels can generally be allowed. In *re Waite & Crocker*, 2 B. R. 452; *s. c. Lowell*, 321; *s. c. 2 L. T. B.* 77; in *re New York Mail Steamship Co.*, 2 B. R. 554.

The court can not allow the repayment of the gross sum advanced by the petitioning creditor to secure the fees of the register, marshal, and clerk, but it may direct the assignee to pay those fees out of the estate, but they must be regular bills of legal fees properly taxed, and not the gross sum advanced. In *re J. P. & J. Smith*, 2 Ben. 122.

The amount which the bankrupt gets by exemption is in most cases trifling, and in no case is it so much but that he and his family are dependent for support on his personal efforts and earnings. Thus the law takes the bankrupt's property, and leaves him in no condition to pay an attorney for services rendered in contesting any doubtful questions as to the acts of bankruptcy charged in the petition, and yet the same law gives to the debtor the right to oppose before a judge or jury the petition for adjudication. When the debtor is given the right to appear and defend, and when the exercise of that right depends on the right to have enough of his property appropriated to pay the expenses incident to appearing and defending, the court has the power, and of right ought to allow such expenses as may be just and proper, to be paid from the assets in the hands of the assignee. Before allowing anything, the court should be satisfied that the defense was fairly justified, and should scrutinize the charges made for such defense. Twenty-five dollars may be allowed for resisting the adjudication. For services in securing the allowance of an exemption refused by the assignee, the sum of \$25 has been allowed. In *re Comstock & Young*, 5 B. R. 191; *s. c. 2 L. T. B.* 186; in *re Portsmouth Savings Fund Society*, 11 B. R. 303; in *re John Mansfield*, 6 Ben. 284.

The payment of \$1,500 by the debtor to his attorney after the filing of the petition is excessive, when the attorney knows that it is useless to oppose the proceeding, and the amount may be recovered by the assignee. An allowance of \$200 may be made for all necessary advice, expenditures, and services. *Triplett v. Hanley*, 1 Dillon, 217.

Services rendered by counsel for the bankrupt in opposing the petition in involuntary proceedings are rendered prior to the adjudication of bankruptcy, and the claim for them is provable like an ordinary debt. The services were not rendered to the assignees. In *re New York Mail Steamship Co.*, 2 B. R. 74.

In order to obtain an allowance out of the fund, it must be shown that the efforts of counsel were not directed toward obtaining delay or hindering the bankruptcy proceedings. In *re John Mansfield*, 6 Ben. 284.

When it is shown that the services rendered by the counsel for the bankrupt saved the estate considerable expense, and expedited the conversion of the same into money, the counsel may be allowed compensation for such services out of the funds in the hands of the assignee. In *re Henry B. Montgomery*, 3 B. R. 426; *s. c. 3 Ben.* 364; in *re Abraham B. Clark*, 43 How. Pr. 70; in *re John Mansfield*, 6 Ben. 284.

A bill by counsel for the bankrupt, for services in attending on the return of the order to show cause, and resisting the grounds on which the

adjudication was sought, and also for services in preparing the inventories and schedules, is not chargeable against the estate of the bankrupt in the hands of the assignee. *In re Bigelow et al.*, 2 B. R. 371; s. c. 3 Ben. 146; s. c. 2 L. T. B. 41.

Where a firm is in bankruptcy, \$100 may be allowed to an attorney as compensation for preparing the individual and partnership schedules. *In re Andrews & Jones*, 11 B. R. 59; s. c. 22 Pitts. L. J. 41.

**Claims Entitled to Priority.**—(b) No expense for litigation can be allowed until the debts entitled to priority are paid in full. *In re Jas. M. Sawyer*, 14 B. R. 241; s. c. 4 Cent. L. J. 470.

The priority allowed by section 3466 attaches to a penalty incurred in selling matches without stamps. *In re Louis H. Rosey*, 8 B. R. 509; s. c. 6 Ben. 137; *U. S. v. Fisher*, 2 Cranch, 358.

The right to priority is not waived by proving the debt. This section introduced an exception from the general rule, and leaves to the United States the right to full satisfaction of their debts, to the exclusion of other creditors. *Harrison v. Sterry*, 5 Cranch, 289; s. c. Bee, 244.

An assignment which was made under circumstances that make it void under the bankruptcy law, is no bar to the claim of the United States to priority. *Ibid.*

Where the United States holds a claim against a firm of which some of the partners are aliens, it may claim priority of payment out of the estate of the resident individual partners without first resorting to the partnership effects. *Lewis v. U. S.*, 14 B. R. 64; s. c. 13 B. R. 33; s. c. 2 W. N. 31; s. c. 32 Leg. Int. 371.

The United States is entitled to priority of payment without regard to the form of the indebtedness. *Lewis v. U. S.*, 13 B. R. 33; 14 B. R. 64; s. c. 92 U. S. 618.

The United States need not exhaust collaterals held by it before claiming priority of payment out of a bankrupt estate. *Ibid.*

The United States is entitled to priority, although it does not prove its claims. *Ibid.*

If a party purchases an imported article, duty free, and is subsequently compelled to pay the duty in order to get possession of the article, he is entitled to be subrogated to the priority of the United States. *In re Kirkland, Chase & Co.*, 14 B. R. 139.

A party who purchased an imported article, duty free, and was compelled to pay the duty in order to get possession thereof, is entitled to priority, although he has proved his claim as unsecured. *In re Kirkland, Chase & Co.*, 14 B. R. 157; s. c. 22 Pitts. L. J. 207; s. c. 8 C. L. N. 410.

(c) A State may come into the bankruptcy court and claim taxes due to it, but it can not be compelled to do so. *Stokes v. State*, 9 B. R. 191; s. c. 46 Ga. 412.

In West Virginia, the State has a prior lien on all realty for taxes, and the undoubted right to enforce it to the prejudice of any claim due to a citizen, although such lien may be subsequent in point of time. If the lien is for a debt other than taxes, the State is not entitled to any preference over other creditors of the same class. *In re Brand*, 3 B. R. 324; s. c. 2 L. T. B. 66.

The failure of the bankrupt to comply with his covenant to pay the taxes assessed upon the demised premises, does not give the lessor a right to claim a priority upon the payment thereof. In *re Parker & Peck*, 6 Ben. 286.

Although a warden who has given bond for the performance of his official duties deposits money received from the State in his official character, yet the State is not entitled to priority of payment out of the estate of the bankrupt bank. In *re Corn Exchange Bank*, 15 B. R. 216; s. c. 9 C. L. N. 431.

(d) This section does not refer to any part of the estate derived from the sale of property on which creditors may have a specific lien. Operatives can not, therefore, claim a priority over lien creditors in the distribution of such a fund. In *re William McConnell*, 9 B. R. 387; s. c. 31 Leg. Int. 61.

Where the fund derived from the sale of property in a manufactory is not sufficient to pay both the landlord and the operatives, they will, under the laws of New Jersey, be allowed to share pro rata. *Ibid*.

Laborers employed by a brickmaker are entitled to a priority under this section. A party who has taken an assignment of the claims of several laborers, as security for money advanced by him to them, is entitled to demand this priority on each claim so held by him, and the balance that remains after the payment of his advances will be paid to the laborers. In *re S. Brown*, 3 B. R. 720; s. c. 4 Ben. 142.

A claim by a father for services rendered by his minor son as an operative to the bankrupt is entitled to priority to the amount of \$50. In *re Harthorn*, 4 B. R. 103.

A surveyor of wood is not entitled to a preference as an operative for his services. In *re Blackman Bros.*, 6 C. L. N. 18.

If the claim arises under an entire contract for the labor of the claimant and the services of his team, it can not be apportioned, and the claimant is not entitled to a preference as an operative. *Ibid*.

The claim of an apprentice for work done beyond the time fixed by the master as reasonable, under an agreement for a specific compensation, is entitled to priority as the claim of an operative. In *re Steiner*, 1 Penn L. J. 368.

The claim of an attorney for services rendered in defending a suit prior to the commencement of the proceedings in bankruptcy is not entitled to priority. In *re Richard Handell*, 15 B. R. 71.

The claim of an attorney for services rendered in preparing the petition and schedules, and filing the same, is not entitled to priority. *Ibid*.

An accountant who is employed as an expert to examine and straighten the books of the bankrupt is entitled to priority. In *re Taylor*, 15 B. R. 95.

If the general creditors agree, the assignee may pay workmen as soon as the money comes to hand without requiring proof of their claims. In *re James M. Sawyer*, 14 B. R. 241; s. c. 4 Cent. L. J. 470.

(e) This is limited to priorities or preferences created by the laws of the United States. It does not extend to priorities or preferences created by the laws of a State. In *re Stuyvesant Bank*, 9 B. R. 318; s. c. 10 B. R. 399; s. c. 49 How. Pr. 133; s. c. 12 Blatch. 179.

An agreement that a creditor shall have priority of payment out of the assets, is contrary to the entire spirit and purpose of the statute, and is invalid. *Ibid.*

The surety on a custom-house bond is entitled to priority of payment out of the estate of the principal. *Mott v. Maris*, 2 Wash. 196; *Champneys v. Lyle*, 1 Binn. 327.

The surety on a custom-house bond is entitled to priority, although he paid it after the commencement of proceedings in bankruptcy. *Mott v. Maris*, 2 Wash. 196.

If the trustee of the principal in a duty bond receives the funds of the principal and then mingles them with his own, the surety can not claim priority of payment out of the estate of the trustee in bankruptcy. *Pollock v. Pratt*, 2 Wash. 490.

A surety upon a custom-house bond can not lay an attachment in the hands of the assignee, for Congress did not consider the same person in relation to the same property indifferently as the assignee holding the property adversely to the bankrupt, and as a trustee holding it under and for him. *Oliver v. Smith*, 5 Mass. 183.

Taxes, whether Federal or State, may be collected in the ordinary way, but if not collected, and the property passes to and is administered by the assignee, the taxes are then entitled to priority and preference under this section. *U. S. v. Herron*, 9 B. R. 535; s. c. 20 Wall. 251; s. c. 1 A. L. T. (N. S.) 274.

ACT OF 1898, CH. 5, § 39. **Duties of Referees.**—(a) Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable:  
\* \* \* (4) give notices as herein provided.

ACT OF 1867, § 5102. Whenever a dividend is ordered, the register shall, within ten days after the meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward, by mail, to every creditor a statement of the dividend to which he is entitled, and such creditor shall be paid by the assignee in such manner as the court may direct.

Statute revised -- March 2, 1867, ch. 176, § 27, 14 Stat. 529. Prior Statute -- April 4, 1860, ch. 19, § 29, 2 Stat. 29.

The list is the list shown by Forms Nos. 32 and 33. *Anon.*, 1 B. R. 219; in re *John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.

There is no warrant in the statute for paying dividends to creditors who have not proved their claims; on the contrary, all sections on the subject expressly or by necessary intendment refer to creditors who have verified their debts in the mode required by law. In re *A. W. Hoyt*, 3 B. R. 55.

The passing of the order of dividend is the period that fixes the rights of creditors in respect to that particular dividend. Creditors who prove their claims after that time can not participate in the dividend, although the proofs are made previous to the payment of the money out of the hands of the assignee. This construction is the only one that can give consistency to the proceedings. If additional debts may be brought into the computation, no pro rata can ever be fixed, as it would be subject to incessant fluctuations and renewals. In re Edmund H. Miller, 1 N. Y. Leg. Obs. 180.

ACT OF 1898, CH. 7, \* \* \* § 66. Unclaimed Dividends.—  
(a) Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

(b) Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

A dividend duly made and filed in court can not be disturbed except for some error committed by the register, apparent from his memoranda and papers on file, existing at the time of or prior to the making of the dividend. In re B. K. Smith, 15 B. R. 97.

A register has no power to vacate or reopen a dividend for the purpose of paying a claim which was not proved and filed or presented prior to the dividend meeting. *Ibid*.

A register has no power to vacate or reopen a dividend for the purpose of paying a claim for services rendered to the assignee, which was not presented at the dividend meeting. *Ibid*.

Every creditor who proves his debt is entitled to a dividend, whether he is an individual creditor or a creditor of a firm of which the bankrupt was a member. *Tucker v. Oxley*, 5 Cranch, 34; s. c. 1 Cranch C. C. 419.

If a writ of error is pending, and a bond has been filed to stay execution, no dividend can be paid on the judgment until the writ of error is determined, when the debt will be ordered to be paid or expunged, or further suspended, as shall be indicated by the exigencies of the judgment on the writ of error. In re Daniel Sheehan, 8 B. R. 345.

Where only one creditor has proved his claim, he is entitled to be paid in full, if there is enough for that purpose; if there is not enough, he takes the whole. In re Haynes, 2 B. R. 227; s. c. 1 L. T. B. 121; in re James, 2 B. R. 227; s. c. 1 L. T. B. 121.

If there is a surplus fund after payment of all the debts of a bankrupt bank, the holders of its bills may be allowed interest from the date of the adjudication. In re Bank of North Carolina, 10 B. R. 289; s. c. 12 B. R. 129.

If the assets are more than sufficient to pay all the claims in full that have been proved against the estate, interest may be allowed up to the day of the payment of the claims respectively. In *re Edward Hagan*, 10 B. R. 383; in *re R. M. & S. R. Town*, 8 B. R. 40.

After a dividend has been declared, an attachment of the sum due to a creditor may be laid in the hands of the assignee. *Decoster v. Livermore*, 4 Mass. 101. Contra, in *re Bridgman*, 1 B. R. 312; s. c. 2 B. R. 252; *Jackson v. Miller*, 9 B. R. 143; s. c. 6 L. T. B. 95.

The assignee in an action to recover a dividend can not deny the authority of the court to declare the dividend. *Gulick v. McIver*, 3 Cranch C. C. 650.

Unclaimed dividends can not be turned over to the bankrupt so long as any creditors remain unpaid and choose to insist upon payment. In *re Peter Blight*, 1 Penn. L. J. 225.

If dividends remain unpaid they will, after a certain time, fall into the general fund, and a new dividend may be made. *Ibid.*

If the holder of a note which is indorsed by two persons receives payment in full from the second indorser, and subsequently accepts a dividend from the estate of the second indorser, he must be considered as holding such dividend for the use of the second indorser. *Selfridge v. Gill*, 4 Mass. 95.

Where a balance remains in hand, after paying all the creditors who have proved their claims, it should be held for those who have failed to prove their claims. In *re Haynes*, 2 B. R. 227; s. c. 1 L. T. B. 121; in *re James*, 2 B. R. 227; s. c. 1 L. T. B. 121.

After the debts are paid, the assignee is trustee for the bankrupt; and the debts are those which have been duly proved to be such. The balance that remains after such debts are paid may be given to the bankrupt. *Steevens v. Earles*, 25 Mich. 40; in *re A. W. Hoyt*, 3 B. R. 55; in *re Lathrop et al.*, 5 B. R. 43; s. c. 5 Ben. 199; *Steeve v. Aylesworth*, 18 Conn. 244; *Cromwell v. Connegys*, 7 Ala. 498.

An omission of property from the schedule will not estop the bankrupt or his heirs from claiming any title or interest in it. *Steevens v. Earles*, 25 Mich. 40.

It can make no special difference whether the rights of the assignee are regarded as powers or trusts. In most respects they are quite analogous to the former. Under the statute, the rights of the bankrupt to what remains to him as surplus is the same in either case, whether regarded as the residuum of a trust or as a title discharged of the burden of a power of disposal. The statute makes no provision for a reconveyance, and without it the title to land that remained undisposed of after the termination of the proceedings, and the payment of all expenses, and all the claims that have been proved, vests in the bankrupt, because the estate of a trustee who receives land for particular purposes terminates when they are fulfilled. *Steevens v. Earles*, 25 Mich. 40; *Collie v. Jameson*, 13 B. R. 1; s. c. 6 N. Y. Supr. 566; s. c. 11 N. Y. Supr. 284.

The bankrupt should file a petition, on oath, showing his reasons to believe that no other creditors desire to prove their claims, and asking to



have the fund paid to him. Before such a payment is made it should be shown that the creditors have had due notice of the proceedings, and an opportunity to prove their claims. In re A. W. Hoyt, 3 B. R. 55; in re Lathrop et al., 5 B. R. 43; s. c. 5 Ben. 199.

If the assignee resists, the bankrupt is not entitled to have the property turned over to him, although no debts have been proved against the estate, and a long time has elapsed since the filing of the petition. In re John S. Wright, 6 Biss. 317.

When the declaration of a dividend was on the face of the deposition unauthorized, the assignee may withhold its payment. In re Hugh T. Herrick, 13 B. R. 312.

ACT OF 1867, § 5103. If, at the first meeting of creditors, or at any meeting of creditors specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct, three-fourths in value of the creditors whose claims have been proved shall resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt shall be settled by trustees, under the inspection and direction of a committee of the creditors, the creditors may certify and report such resolution to the court, and may nominate one or more trustees to take and hold and distribute the estate, under the direction of such committee. If it appears, after hearing the bankrupt and such creditors as desire to be heard, that the resolution was duly passed, and that the interests of the creditors will be promoted thereby, the court shall confirm it; and upon the execution and filing, by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt shall be wound up and settled by trustees according to the terms of such resolution, the bankrupt, or if an assignee has been appointed, the assignee shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such resolution not been passed. Such consent and the proceedings under it shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it. The court, by order, shall direct all acts and things needful to be done to carry into effect such resolution

of the creditors, and the trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors; and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy; and the trustees shall have all the rights and powers of assignees in bankruptcy. The court, on the application of such trustees, shall have power to summon and examine, on oath or otherwise, the bankrupt or any creditor, or any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers, in the same manner as in other proceedings in bankruptcy; and the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this Title. If the resolution is not duly reported, or the consent of the creditors is not duly filed, or if, upon its filing, the court does not think fit to approve thereof, the bankruptcy shall proceed as if no resolution had been passed, and the court may make all necessary orders for resuming the proceedings. And the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this Title.

Statute revised — March 2, 1867, ch. 176, § 43, 14 Stat. 538.

The creditors may avail themselves of the provisions of this section either at the first meeting or at any time subsequent to the first meeting. *In re Decatur Jones*, 2 B. R. 59.

Parties desiring the confirmation of the resolution are the moving parties, and should serve papers in support of their motion on the opposing parties. The opposing parties may then, in turn, serve papers in opposition thereto. *In re American Water Proof Cloth Co.*, 3 B. R. 285; s. c. 1 Ben. 526.

The bankrupt must make affidavit that creditors holding three-fourths of all the debts proven have signed the appointment of the trustees. It is an objection to the trustee that he is a relative of the bankrupt, and to a member of the committee that he has become a creditor by the purchase of claims. It is an insuperable objection that the trustee is one of the committee, which consists only of two. The action of the trustee would neutralize the opposition of the other member, and there is in substance no committee. *In re Wm. Stillwell*, 2 B. R. 526.

The mere fact of relationship in the ninth degree, or to a less degree, on the part of a proposed trustee, to the bankrupt, or to a creditor, even the largest in amount, of the bankrupt, or to a proposed member of the committee, or on the part of a proposed member of the committee to such creditor or to the bankrupt, can not be regarded as a disqualification. Other facts may, however, concur with such relationship to make a confirmation improper. If the proposed member of the committee has a place of business in the district which he visits daily, the fact that he resides out of the district is immaterial. In *re Zinn et al.*, 4 B. R. 436; s. c. 4 Ben. 500; s. c. 40 How. Pr. 461; s. c. 43 How. Pr. 64.

The court has the power to protect the interests of those who do not vote in favor of the resolution. The will of three-fourths in value of the creditors whose claims have been proved, is not to control in respect to the claims of those who do not vote for the resolution, unless the court sees that the interests of the latter will be promoted by carrying the resolution into effect. A trustee who has obligated himself by a private agreement to wind up the estate for his own benefit and that of the signing creditors, to the exclusion of the nonsigning creditors, will not be approved. In *re Theodore H. Vetterlein*, 6 B. R. 518.

A person who has been appointed a receiver in a proceeding in a State court, which is voidable under the bankruptcy law, can not be a trustee. If he is to account to the bankruptcy court at all, he must account to the trustee or assignee to be appointed by that court. It is not proper that he should as trustee be plaintiff, and as receiver be defendant. This is a positive incompatibility which the court can not permit one of its officers to occupy. If he is to be trustee, he must look to the bankruptcy court alone as the source of his authority. If he is to hold and administer as receiver under the State laws the property which he received as receiver, he must so administer it without looking to the bankruptcy court for any authority or direction. If he is to administer such property as trustee, he must so administer it without looking to the State court or any other court but the bankruptcy court for authority or direction. In *re Stuyvesant Bank*, 6 B. R. 272; *Platt v. Archer*, 6 B. R. 465; s. c. 9 Blatch. 559.

The action of the creditors in selecting a trustee and a committee is a unit, and the resolutions must be confirmed as a whole or not at all. If one of the proposed committee is the president of a corporation which claims a preference that is disputed by other creditors, the resolution will not be approved. *Ibid.*

When the order of the court directs that a conveyance shall be executed by the bankrupt and the assignee to the trustee, subject to the approval of the court, the title will not pass until the conveyance is so approved. *Potter v. Wright*, 1 W. N. 637.

The title vested in a trustee chosen under this section is the same in all respects as the title vested in an assignee regularly appointed in proceedings in bankruptcy. In *re David B. Williams*, 2 B. R. 229; s. c. 1 L. T. B. 107, 113; s. c. 3 A. L. Rev. 374.

When a trustee departs from his actual duty, and volunteers to do something outside of his duty for the benefit of the estate, he incurs a personal liability. *Hallam v. Maxwell*, 2 Cln. 136.

When a trustee acts bona fide in the discharge of a duty imposed upon him by law, he does not incur, at least, a primary personal liability. *Ibid.*

The bankrupt may be examined by a creditor, although the proceedings have been superseded by the appointment of a trustee. *In re Jay Cooke & Co.*, 10 B. R. 126.

The intent and effect of this section are that all the ordinary processes and proceedings under the act are for the time being absolutely superseded and suspended, excepting so far as such processes and proceedings are retained by express words or necessary implication. *In re Trowbridge*, 9 B. R. 274.

The power and jurisdiction of the court are retained over the proceeding, in order that it may interfere whenever it may become necessary for the preservation and enforcement of the rights of all parties concerned. The trustee and committee have full power to arrange, and by mutual agreement to adjust everything relating to the settlement and winding up of the estate, but they can not adjudicate or decide any disputed matter. They have no judicial powers. Those are all reserved to the court. *Ibid.*

A creditor who proves his claim before the selection of a trustee and committee, thereby establishes his right *prima facie* to participate in the distribution of assets under those proceedings. If, in such a case, the claim is disputed, the only way in which the dispute can be adjudicated is by an application to the court to expunge or abate the claim, in which application the trustee must, of course, be the moving party. *Ibid.*

The trustees, under direction of the committee, may, if so ordered by the court, proceed to settle the estate just as if there had been no adjudication of bankruptcy, and the bankrupt was managing his own affairs, taking care always to secure legal protection to each of the creditors. If, under such a general order, the interposition of the court is needed for the examination of witnesses under oath, etc., application therefor may be made to the judge or register. And, if made to the judge, he, on granting the same, will order the examination to be had before the register or otherwise. In other words, whenever the trustees and committee are satisfied that demands are correct, and need no testimony to be taken, they can allow the same. When they are not satisfied, the demand should be proved before the register on notice to the trustees. They can dispose of assets and settle the estate without especial orders in each matter before them; keep their own accounts and records of their proceedings; have the aid of the register or judge when needed, and finally have their action ultimately closed by the formal decree of the court. The register should allow no claims except such as are disputed or are submitted to him for decision by the trustees. *In re Darby*, 4 B. R. 211, 309; *in re Zinn et al.*, 4 B. R. 436; s. c. 4 Ben. 500; s. c. 40 How. Pr. 461; s. c. 43 How. Pr. 64; *in re Trowbridge*, 9 B. R. 274. *Contra*, *in re Bakewell*, 4 B. R. 619; s. c. 2 L. T. B. 212; s. c. 18 Pitts. L. J. 289.

If a claim which was not proved before the selection and appointment of the trustee is disputed, the creditor should proceed by petition directly to the court, setting forth the fact, nature, and consideration of his claim, and praying for leave to prove the same and for its allowance. If the

facts stated in the petition make out a *prima facie* case, the court will make an order requiring the trustee to answer the same. Upon the coming in of the answer, the court will proceed by reference to take proofs or otherwise to a final disposition or determination of the matter as may be deemed most expedient. *In re Trowbridge*, 9 B. R. 274.

By providing that over the settlement and distribution the committee shall have the direction, the statute has withdrawn control over them from every other power, and to that extent has superseded the ordinary proceedings in bankruptcy. The ordinary proceedings are intended to be summary. Such hurried settlement of estates is sometimes prejudicial to the interests of the creditors; for this reason the power to administer the estate is given to certain representatives of the creditors. The district court can not, therefore, direct the calling of a meeting for purposes of distribution. *In re Jay Cooke & Co.*, 11 B. R. 1; s. c. 31 Leg. Int. 357; s. c. 1 Cent. L. J. 580; s. c. 22 Pitts. L. J. 59; s. c. 1 W. N. 51.

If the committee exercise their discretion *mala fide*, they may be controlled, but in the absence of fraud, their direction to the trustee in regard to the settlement of the estate is conclusive. Certainly the discretion vested in them can not be controlled by any meeting of creditors called after their appointment. *Ibid.*

Where a creditor has been guilty of unreasonable delay in preparing his claim for proof, the court will not restrain the trustee from declaring a dividend. *Gibson v. Lewis*, 11 B. R. 247; s. c. 32 Leg. Int. 22; s. c. 9 Pac. L. R. 75.

If a creditor, who has not proved his debt, has a lien on certain stock in the hands of the trustee, he may be restrained from disposing of that stock until the claim can be proved. *Ibid.*

The committee are entitled to compensation for their services. *In re Treat*, 10 B. R. 310.

The compensation of the committee should be limited to such an amount as will afford a reasonable compensation for the services required and rendered to a person of ordinary standing and ability competent for such duties. *Ibid.*

The estate in the hands of a trustee is not liable for the register's fees incident to a second general meeting of creditors. *In re Richard H. Hinsdale*, 12 B. R. 480; s. c. 6 Ben. 231.

#### ACT OF 1898, CH. 3, § 12. Compositions, when Confirmed.—

(a) A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.

(b) An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority

in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

(c) A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

(d) The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

(e) Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

**§ 13. Compositions, when Set Aside.**—(a) The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

The register had not the power, by an announcement beforehand, to fix a limit within which examination of the debtor must be concluded, without regard to the nature of the questions sought to be put or the interest with which the same are propounded. *In re Tift*, 17 B. R. 421.

Refusal of one member of a firm to join in voluntary proceedings, attend and be examined, etc., may well deprive him of all benefit of the composition; but unless the refusal or neglect is the result of fraud on part of those partners who do carry on the proceedings it is no reason for avoiding those proceedings as to them. *In re Henry, Curran & Co.*, 17 B. R. 463.

At an adjourned composition meeting, after waiting a reasonable time, creditor was allowed to continue his examination of the debtor which had been taken at regularly adjourned meetings. Subsequently the attorney for another creditor appeared and asked permission to continue an examination which had been previously closed, and that all the testimony taken

at such meeting be stricken out; which was denied. It appearing that his power of attorney had been revoked, he then asked permission to go on with the examination in behalf of another creditor, which was also denied. Held, that the register was right in refusing to suspend the examination then pending. No other creditor was entitled to priority at that time. *In re Tift*, 17 B. R. 550.

The attorney asked permission to examine the bankrupt as to the circumstances under which the revocation of his power of attorney had been obtained, which was refused. Held, no error. *Ibid*.

Register refused to suspend examination then pending until the questions certified by him could be decided. Held, no error. *Ibid*.

An inadvertent mistake in amount of a debt, made by a bankrupt in the schedule filed in composition proceedings, will not avoid the composition. *Beebe v. Pyle*, 18 B. R. 162.

It matters not to what time interest on a debt is computed, provided the interest on all the debts is computed to the same time. *Ibid*.

At the meeting of creditors to take action on a resolution of composition, under law of 1867, amended by act of 1874, the register had no power to require any other person to testify except the debtor. *In re Dobbins*, 18 B. R. 268.

In composition proceedings, the debtor being present may by a vote of the creditors present be excused from examination on account of illness. *In re Wilson & Greig*, 18 B. R. 300.

If a claim is disputed on its merits the register who presides at a composition meeting may examine and pass upon it subject to review by the court. *In re Keller & Goodhue*, 18 B. R. 331.

Creditors not entitled to vote upon proposals for composition without first having proved their debts. *In re Mathers & Moffett*, 17 B. R. 225.

A composition which provides, in addition to an offer of money in deferred payments, that the real estate which the bankruptcy assignee has acquired shall be converted into money for the use of the creditors, is proper. *In re Wronkow & Hogan*, 18 B. R. 81.

Fact that security provided for a composition does not certainly secure the full payment of the composition and does not make the composition uncertain. *In re Wilson & Greig*, 18 B. R. 300.

Under the law of 1869, as amended, it was held that where a composition was only two per cent., and the largest creditor, without whose vote, if she had been present, it could not have been passed, was strongly opposed to it, and owing to a misdirection of the note, by accident or design, she was not present to vote, there was also a doubt as to right of one of the consenting creditors to vote. Held, that the composition was not for the best interests of the creditors; that there was a formal but not a real compliance with the requirements of the law as to consenting majority of creditors. *In re Spencer*, 18 B. R. 199.

Objections to a claim of a creditor on ground that it is fictitious or invalid should be promptly made, and can not be raised for first time upon a motion for confirmation. *In re Bloch*, 18 B. R. 328.

The statute allows any composition which is satisfactory to the requisite number of the creditors and which is for the best interests of all concerned. *In re Purcell*, 18 B. R. 447.

In composition proceedings, when objections are interposed by the minority whose claims will be discharged against their will, it is the duty of the court to examine those objections fully and carefully. *In re Keller*, 18 B. R. 36.

Under the repealed law, a refusal by the register to proceed further with the examination of the debtor without payment of his fees or security, full opportunity having been given to make such payment, or deposit security, before closing the examination, affords no ground upon which a creditor can base an opposition to the recording of composition. *In re Tift*, 18 B. R. 227.

So long as the inventory is produced before the register, and at all times made accessible to the creditor for the purpose of examining it, or the bankrupt in respect to it, the creditor is not prejudiced by a refusal of permission to take a copy of it. *Ibid*.

At a composition meeting only those creditors who prove their claims are competent to engage or take part in its proceedings. *In re Keller & Goodhue*, 18 B. R. 331.

It is not a good objection to a composition that the schedules stated the real estate of the debtor as of unknown or uncertain value. *In re Welles*, 18 B. R. 525.

Nor is it a good objection that property standing in the name of the bankrupt's wife should have been included in his schedules, and should be deemed the property of the bankrupt, where the facts relating thereto were brought out by the testimony, and considered by the creditors in coming to the conclusion to accept the composition. *Ibid*.

The general objection that the estate could pay more is not one that will avail unless very clearly made out, and unless the disparity is evident. *Ibid*.

Although the bankrupt has acted in utter disregard of the rights of his creditors, and it is probable that he will profit by the composition, yet if, looking at the assets of the estate, it is apparent that the interests of the creditors will be better promoted by the composition than by administering the estate in bankruptcy, the court has no alternative but to confirm the composition. *In re Allen*, 17 B. R. 157.

Where it appears that the creditors can receive no more than the amount proposed, if ordinary administration be had, and there is no adequate proof of collusion, the composition should be confirmed. *In re Keller*, 18 B. R. 36.

The authority of a bankruptcy court upon the submission of a resolution (under law of 1874) of composition, duly accepted and confirmed by the requisite number of creditors, is not limited to the determination of a mathematical result. In the absence of fraud, accident or mistake, the determination of the creditors is final as to the quantum of composition; but when, through preferences fraudulent under the act, injustice has clearly been done to the body of creditors, the ancient maxim must apply.



"The law would rather tolerate a private loss than a public evil," and the court will not lend its aid to the relief and discharge of the debtor, and create a precedent for the doing of that which the bankruptcy laws were devised to prevent. In *re Jacobs*, 18 B. R. 48.

The appellate court will not inquire into the question whether the composition is for the best interests of the creditors, unless specific errors in the action of creditors or the court below can be pointed out which, if sustained, would change the judgment. In *re Wronkow & Hogan*, 18 B. R. 81.

The circumstance that there is no security given for the payment of the composition notes is merely one of the facts to be considered with and in the light of all the other facts on the question whether the composition is for the best interest of all concerned. In *re Wilson & Greig*, 18 B. R. 300.

The question as to the time within which, and how rapidly, the debtor can pay the composition, is one for the creditors to consider, and their judgment will not be reversed unless valid reasons for so doing are shown. *Ibid.*

A composition was for twenty-five per cent. payable five per cent. cash in five days after confirmation, and ten per cent. at the end of three and six months from same date. Resolution provided that upon payment of the five per cent. the property should revert to the debtor. It appeared that the bankrupts had, with full knowledge of the wrongful nature of their act, used moneys belonging to a creditor, without his consent, which they had deposited in bank in their own name as a special deposit for him. Held, that the arrangement was not judicious nor reasonably safe for the creditors. A person proved once to have misappropriated the funds of another, fully understanding the wrongful character of the act, is unfit to be trustee for benefit of his creditors. In *re Bloch*, 18 B. R. 328.

A corporation in its managing officers is not of that unquestionable personal and business character that it would be reasonably safe to trust it for three years, pending the deferred payments of the composition, with the property on which creditors had a hold; and composition was refused where its president, who was also its treasurer, had used the funds and credit of the company to a large amount for his own benefit, and had resigned office as treasurer, but not as president, after his defalcation had been discovered, and none of the trustees had manifested any disposition to punish him or compel him to make restitution, but had settled with him. In *re The McNab & Harlin Mfg. Co.*, 18 B. R. 388.

Under law of 1867, it was held that the mere fact that bankrupt had been refused a discharge for a cause set forth in section 5110, Revised Statutes, was not an absolute bar to a composition. In *re Odell*, 16 B. R. 501.

A composition of five per cent. sustained where there appeared to be no assets of any value and no probability of any dividend, though the assignee and the parties were acting in good faith. *Ibid.*

The court will not hesitate to interfere when the debtor has deceived the creditors into a vote which they would not have given had the facts

been honestly and fairly before them; nor to withhold its assent to the composition if it is satisfied that the proceedings are collusive, although there is only one dissenting creditor. But the court must act on evidence, not suspicion. *In re Keller*, 18 B. R. 36.

While the rights of the minority creditors should be carefully protected against all unreasonable acts of the majority, the judgment of the requisite majority should always be allowed to prevail, unless obtained without sufficient consideration or by some unfairness or undue influence. *In re Wronkow & Hogan*, 18 B. R. 81.

On the question whether, the composition being in other respects fair and just, the debtor should be allowed to keep his property, the principal element is his personal and business character. *In re Wilson & Greig*, 18 B. R. 300.

It is competent to produce any creditor and prove by him that he has been induced or biased to sign the resolution by any false statement or by any evil practice of the debtor. *In re Keller & Goodhue*, 18 B. R. 331.

Bankruptcy court has a right to and will, on application, enjoin creditors holding unsecured debts, or debts in respect to which any security has been surrendered, from harassing the debtor as long as this composition proceeding is pending, and it is pending until the time allowed for making the last payment has expired. *In re Richard H. Hinsdale*, 16 B. R. 550.

A provision of a resolution of composition to effect that upon delivery of the composition notes all the property in the hands of a voluntary assignee of the bankrupt shall be delivered to them, and the assignee discharged from responsibility, is wholly nugatory, so far as it purports to affect the assignee's responsibility, or the rights of creditors under the assignment, otherwise than as the confirmation of the composition and release of the creditors' claims by payment of the composition may necessarily affect them. *In re Hyman*, 18 B. R. 299.

Confirmation of composition does not give the assent of the court to what such provision vainly attempts to effect. *Ibid*.

Confirmation of the composition, containing provision that the proceedings in bankruptcy may be discontinued at any time after delivery of the notes, does not bind the court to allow such discontinuance, unless sufficient grounds therefor are shown to exist when the application is made. *Ibid*.

A provision in composition agreement that the proceedings may be discontinued at any time without notice to the creditors is to be treated merely as a waiver on the part of creditors of notice of an application to discontinue, and does not bind the court to grant such discontinuance. *In re The McNab & Harlin Mfg. Co.*, 18 B. R. 388.

Where by the terms of a composition it is provided that the property and books of the bankrupt, which had been held by a voluntary assignee, should be returned to the debtors, creditors who are bound by the composition will be held to have consented to such transfer, and if by any means such transfer shall be effected, in furtherance of the terms of composition, they will not be permitted to undo what has thus been done with consent. *In re Rodger et al.*, 18 B. R. 381.

Moneys payable under a composition can not be reached by attachment or their payment obstructed by proceedings, of another court, the object of which is to withhold the fund from the creditor entitled thereto for the security of a plaintiff pending the litigation. *In re Kohlsaat et al.*, 18 B. R. 570.

Except in a case where the plaintiff, in action against the creditors claims title to, or a specific lien upon, the fund in question, or has procured the appointment of a receiver who has succeeded to the creditor's title, the bankruptcy court can not be asked to suspend or deny the right of the creditor to receive his composition. *Ibid.*

A delay in payment of composition notes, occasioned by legal or other difficulties, will not ipso facto avoid the composition; nor will a failure to pay one of the creditors according to the terms of composition work a forfeiture of the bankrupt's rights under same as to those creditors to whom payment has been punctually made. *Ibid.*

A resolution of composition was adopted in this case, by which the creditors agreed to accept the notes of the new firm, to be composed of two members of the old firm and such other person or persons, if any, as they might associate with them, with a fresh capital of at least \$20,000, which if borrowed should not be withdrawn until the composition was paid. The new firm was formed, with the capital required, and a deed of release signed by the creditors. The capital which had been borrowed was repaid soon after. The first and second installments of the composition were paid by the firm, but not the third. A day or so before this the case had been dismissed. Held, that the dismissal should not be vacated, and the case sent back into bankruptcy, because (1) creditors of the new firm could not prove their debts or be paid in this proceeding, and (2) because the remaining partner, himself innocent, lost his opportunity, by the discharge, of seeing that the composition was fully and faithfully carried out. *In re Ewing & Co.*, 17 B. R. 109.

No injunction to restrain creditors from interfering with or molesting the bankrupt can be granted after the lapse of the full time provided by the terms of composition.

This rule is applicable to a case in which the bankrupt has put in his answer in a suit in a State court before the composition could be set up as a defense, and has been obliged to apply for leave to put in a supplemental answer setting up the composition and its fulfillment, where he had had ample time to apply for and obtain an injunction during the pendency of the composition proceedings. *In re Nedenzahl & Marks*, 17 B. R. 23.

Where notes given upon a composition settlement fall due, pending action upon a petition to review the order of confirmation, and the petitioners refuse to receive payment, the money must be paid into court in order to absolve the bankrupt from liability. *In re Alfred P. Reynolds*, 16 B. R. 176.

Under such circumstances, upon a subsequent demand of payment by the creditor, and refusal by the bankrupt, the former is entitled to a summary order for payment. *Ibid.*

Notice of an application to set aside composition proceedings should be given to all the creditors, as well as to the debtor. *Ex parte Hamlin*, in re Brodt, 16 B. R. 320.

An agreement by a bankrupt to pay a debt of his creditor in full, if he will assent to his discharge, is illegal and contrary to the provisions of the act; and all instruments made for the purpose of giving it effect, though made after discharge obtained, are tainted with the illegality, and can not be enforced by a court of equity, though executed by a third party without knowledge of fraudulent agreement. *Blasdel v. Fowler*, 17 B. R. 412.

In bankruptcy proceedings where the question is one of the exercise of discretion, laches, when coupled with injury to innocent parties, are circumstances of controlling weight. In re Herman, 17 B. R. 440.

The bankrupts included in their schedule of liabilities the special capital of one G., who, under the articles of copartnership, was a special partner, but who, by reason of failure to comply with the statute requiring the special partner's capital to be paid in cash, was in fact a general partner. Held, not to be a fraudulent statement, as the other partners then supposed him to be a special partner, and, though his claim against the assets as such special partner would be postponed to those of other creditors, it was properly described as a liability as they then understood it. In re Henry, Curran & Co., 17 B. R. 463.

ACT OF 1867, § 5103A (June 22, 1874, ch. 390, § 17, 18 Stat. 182). That in all cases of bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to each known creditor, of the time, place, and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor. And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor. And in calculating a majority for the purpose of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors above the amount of such security, to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way. And creditors

whose debts are fully secured shall not be entitled to vote upon or to sign such resolution without first relinquishing such security for the benefit of the estate.

The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he, or, if he is so prevented from being at such meeting, some one in his behalf, shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due.

Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court shall, upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times.

The creditors may, by resolution passed in the manner and under the circumstances aforesaid, add to, or vary the provisions of, any composition previously accepted by them, without prejudice to any person taking interests under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner and proceeded with in the same way and with the same consequences as the resolution by which the composition was accepted in the first instance. The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.

Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor and of the person to whom it is payable, and any other

particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.

Any mistake made inadvertently by a debtor in the statement of his debts may be corrected upon reasonable notice, and with the consent of a general meeting of his creditors.

Every such composition shall, subject to priorities declared in said act, provide for a pro rata payment or satisfaction, in money, to the creditors of such debtor, in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up.

The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. Rules and regulations of court may be made in relation to proceedings of composition herein provided for in the same manner and to the same extent as now provided by law in relation to proceedings in bankruptcy.

If it shall at any time appear to the court, on notice, satisfactory evidence, and hearing, that a composition under this section can not, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside; and, in either case, the debtor shall be proceeded with as a bankrupt in conformity with the provisions of law, and proceedings may be had accordingly; and the time during which such composition shall have been in force shall not, in such case, be computed in calculating periods of time prescribed by said act.

This section should receive a strict construction, because it is in plain derogation of common right. It compels the dissenting minority of creditors to accept just so much on their claims as the debtor and the requisite majority see fit to resolve that all shall accept. Its provisions, therefore, should not be extended by construction to embrace more than the words clearly and manifestly import. In *re Shields*, 15 B. R. 532; s. c. 4 Cent. L. J. 557; s. c. 21 Pitts. L. J. 190.

A corporation as well as a natural person is entitled to the benefits of the provisions for a composition. In *re Weber Furniture Co.*, 13 B. R. 529; s. c. 13 B. R. 559.

A case in bankruptcy must be pending to authorize proceedings for a composition. In *re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.

A meeting to consider a composition may be called in an involuntary case, although the petition is defective, for the defect does not affect the jurisdiction of the court. *In re Morris*, 11 B. R. 443.

When an application is filed, an order will be made directing the register to call a meeting and give the proper notices. *In re Michael H. Spades*, 13 B. R. 72; s. c. 6 Biss. 448.

An order referring a proposition of compromise to a register, should require him to report whether the resolution of composition is duly passed at the first meeting, whether it has been confirmed by the required signatures, and whether the terms of the composition are for the best interests of all concerned. *In re Scott, Collins & Co.*, 15 B. R. 73; s. c. 4 Cent. L. J. 29.

If a firm is in bankruptcy, one member alone may make a proposition of compromise, for the word "debtor" means any one or more of the debtors. *Pool v. McDonald*, 15 B. R. 560; s. c. 9 C. L. N. 322; s. c. 2 C. L. B. 151.

The register is an officer of the court, and must take judicial notice of its judgments and decrees. *In re Scott, Collins & Co.*, 15 B. R. 73; s. c. 4 Cent. L. J. 29.

The register should keep a docket and minutes, but need not send memoranda to the court, because the report includes them. *In re Benjamin F. Spillman*, 13 B. R. 214.

The course of proceedings pointed out by the law seems to be for the creditors to meet and discuss, the debtor being present and answering all questions, and then they may not only accept or reject a proposition which was made and filed ten days before, but the debtor may make and they may accept quite a different proposition from that which he came prepared to offer. The creditors are to be notified of the time, place and purpose of the meeting, but not necessarily of the precise proposition to be made. *In re Haskell*, 11 B. R. 164; s. c. 9 Pac. L. R. 36; s. c. 1 Cent. L. J. 531.

Where the sworn schedules have been filed, they may be used as the written statement. *Ibid.*

The testimony of the debtor given at the meeting constitutes a part of his statement. *In re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.

The inquiry may be made by any person entitled to inquire, although the other creditors object. *In re Morris*, 11 B. R. 443.

The examination of the debtor is for the purpose of arriving at a true exhibit of his affairs, and the inquiries to be made must be only such as will be in furtherance of such object, and such as will aid in determining whether any composition at all ought to be accepted, or the terms of the one which ought to be accepted. *In re Holmes & Lissberger*, 12 B. R. 86; s. c. 49 How. Pr. 142.

If any creditor desires a postponement of the vote until after examination is completed, it should be postponed. *Ibid.*

If the debtor has kept books in his business, they must be produced on demand of any inquiring creditor, and the debtor must answer all inquiries in reference to any entry in such books which bears upon the question of the exact condition of his affairs. *Ibid.*

The course of examination must be regulated by the sound discretion of the register. The taking of the vote may be postponed to a definite day in order to allow the examination to be completed. *Ibid.*

If it seems necessary that time shall be given to have the books examined by an expert, the register must regulate the matter of adjournment in his sound discretion. *Ibid.*

When the books have been previously examined by a committee of creditors, that circumstance is entitled to consideration on the question of granting time for a further examination of the books. *Ibid.*

The examination of the debtor should be conducted as the examination of a witness is conducted in court, and he should answer the inquiries made of him by an examining creditor, and do no more until the examining creditor has closed, after which he may of his own volition, or in answer to inquiries by his own counsel, make such explanations as are relevant. The examination should be reduced to writing, and be signed and sworn to by him. *Ibid.*

The register has the power to regulate the form and order of proceedings at the meeting, and to decide questions that arise, subject to review by the court. *Ibid.*

The register must decide who are entitled to vote, and in respect to what amount of debts, and pass upon the regularity and propriety in form of the proofs of debts and of letters of attorney. *Ibid.*

Creditors must prove their claims in order to vote on a resolution of composition. *In re Scott, Collins & Co.*, 15 B. R. 73; s. c. 4 Cent. L. J. 29.

In involuntary proceedings the petitioning creditors on whose motion an order to show cause has been issued, need not prove their debts anew. *Ibid.*

If the children of one partner who holds a firm note, as their guardian, are *sui juris*, they may prove the debt and vote thereon, although the note has not been indorsed to them. *In re Bailey & Pond*, 2 Woods, 222.

A married woman may vote for and sign a resolution if she has the authority of her husband, whether it is exhibited or not. *Ibid.*

If the husband subsequently files an affidavit stating that his wife had authority to vote for and sign the resolution, and that her act is approved by him, this ratifies and validates her act. *Ibid.*

A creditor who has bought up claims against the debtor may vote on them against the adoption of the resolution. *In re Morris*, 12 B. R. 170.

A secured creditor can be admitted to vote only on the excess of his debt above the value of the security. *In re Michael H. Spades*, 13 B. R. 72; s. c. 6 Biss. 448.

A creditor who has personal security may vote as an unsecured creditor. *Ibid.*

Where a partnership proposes a composition, all the creditors, both partnership and individual, may vote without any classification, if no objection is made, but if one of any class of creditors perceives that the other class is about to force an unjust composition upon him, he may demand a separate vote. *Ibid.*



If the voting of all the creditors, both partnership and individual, works injustice, redress may be obtained at the hearing before the court for a ratification. *Ibid.*

The word "creditor" means all who have debts provable in bankruptcy. *In re Trafton*, 14 B. R. 507.

If a claim is in dispute the district court may provide for its liquidation, either by permitting a pending action to be prosecuted to judgment in order to ascertain the amount, or by ordering an inquiry before the court itself. *Ibid.*

Where the letter of attorney especially authorizes the attorney to sign a compromise for a precise sum, and the attorney has but a ministerial duty to perform, there is no incompatibility in the same person appearing as attorney for the debtor upon the record, and also as attorney in fact authorized to compromise for the sum named in the power of attorney itself. *In re Weber Furniture Co.*, 13 B. R. 529; s. c. 13 B. R. 559.

When an attorney-at-law appears before a register to represent a person, he is to be accepted as such attorney unless some one puts him to proof, by a rule therefor, to show his authority. *In re Scott, Collins & Co.*, 15 B. R. 73; s. c. 4 Cent. L. J. 29.

If a person who is not an attorney-at-law, desires to represent another before a register, he must show a formal power of attorney. *Ibid.*

If a telegram is produced revoking a power of attorney, the register, if the facts justify it, may, in his discretion, suspend action until proof of the revocation and new appointment can be presented to him. *Ibid.*

The proceedings before the register must be recorded in writing as they take place in order to be in a shape to be reported. *In re Holmes & Lissberger*, 12 B. R. 86; s. c. 49 How. Pr. 142.

In the expressions "in calculating a majority," and "the majority in value," and "the majority in number," the word "majority" refers to and embraces everything previously spoken of in the section as a result to be arrived at by calculation. It embraces the "majority in number" of the creditors assembled at the first meeting; the "three-fourths in value" of such creditors; the "two-thirds in number" of all the creditors; and the "one-half in value" of all the creditors. *In re John B. Gilday*, 11 B. R. 108; s. c. 7 Ben. 491.

Creditors whose claims do not exceed \$50 are to be disregarded in computing the majority who must pass the resolution, as well as in ascertaining the number of those who are required to sign the confirmatory paper. *In re Wald & Aehle*, 12 B. R. 491; s. c. 7 C. L. N. 26; s. c. 1 Cent. L. J. 531; *in re Michael H. Spades*, 13 B. R. 72; s. c. 6 Biss. 448.

The statute means that in making the calculation to see whether the two-thirds in number of all the creditors have signed the composition, the creditors whose debts do not exceed \$50 shall not be reckoned either as a part of the whole number of creditors, or as a part of the necessary two-thirds in number. *In re John B. Gilday*, 11 B. R. 108; s. c. 7 Ben. 491.

Where the assets are undoubtedly sufficient to pay workmen to the extent of \$50 each, they can not vote on the question whether a resolution

of composition shall be adopted or not, except to the extent of their respective debts above \$50. In re O'Neil, 14 B. R. 210.

Creditors who are not fully secured need not be reckoned in computing the proportion who must join in a composition. In re Aaron Van Anken, 14 B. R. 425.

A creditor who has an attachment issued within four months before the commencement of proceedings in bankruptcy, can not vote at a composition meeting. In re Scott, Collins & Co., 15 B. R. 73; s. c. 4 Cent. L. J. 29.

A claim for damages in closing up a store in order to force a settlement may be excluded from the estimate of the debts, of which the proper proportion must be obtained in order to make a composition valid, if the damages have never been assessed. In re Bailey & Pond, 2 Woods, 222.

After the resolution has been adopted it must be confirmed. This provision was designed to protect the creditors from the effect of a resolution adopted by a small number of creditors at the meeting. A reasonable time may be given to secure such additional signatures as may be required to confirm it. In re Michael H. Spades, 13 B. R. 72; s. c. 6 Biss. 448.

The confirmation of a resolution of composition need not be made at the meeting or presented to the register. The debtor may procure it within any reasonable time after the meeting. In re Benjamin F. Spillman, 13 B. R. 214.

No second meeting of creditors, as such, need be held to confirm the resolution of composition. In re Scott, Collins & Co., 15 B. R. 73; s. c. 4 Cent. L. J. 29.

The statute does not contemplate that the confirmatory signatures must necessarily be attached at the first meeting. *Ibid.*

The confirmatory signatures must be attached at or before the hearing for a ratification. *Ibid.*

The court has a discretion to accept or reject the composition, as may be for "the best interests of all concerned." This means the best interest at the time being, all things considered. In re Haskell, 11 B. R. 164; s. c. 1 Cent. L. J. 531; s. c. 9 Pac. L. R. 36.

At the hearing for the ratification of the resolution, objections can be presented as to the due passing of the resolution, as to the confirmatory signatures, and as to what is for the best interest of all concerned. In re Scott, Collins & Co., 15 B. R. 73; s. c. 4 Cent. L. J. 29.

None but unsecured creditors can object to the ratification of a resolution. *Ibid.*

The debtor is not required to appear at the hearing for a ratification or submit any statements. *Ibid.*

Where no evidence outside of the statement and resolution is presented, the resolution, as a nearly universal rule, should be recorded. The only exception is where it manifestly appears there was some fraud, accident, or mistake. Such a contingency as would incline the court in any other case of ordinary practice to refuse *ex mero motu* to proceed, and upon notice to all parties concerned, require the exceptional and suspicious cir-

cumstances to be explained. In *re Weber Furniture Co.*, 13 B. R. 529; s. c. 13 B. R. 559.

Where no fraud appears, the duty is cast upon the objecting creditors to show affirmatively that the resolution is unwarranted, and the court should record it, unless upon notice and hearing it inquires into the testimony which shows that it ought to be rejected. In *re Weber Furniture Co.*, 13 B. R. 559.

The presumption is in favor of the resolution, and the burden rests upon the objecting creditors to produce the testimony to show that it ought not to be recorded. In *re Weber Furniture Co.*, 13 B. R. 529; s. c. 13 B. R. 559.

In deciding a motion to confirm a resolution of composition, the court will take into account the relations of the creditors favoring the compromise to the debtor, and the relative number of creditors whose individual opinions are expressed in person by the resolution, as compared with those who dissent. *Ibid.*

Whether a great or small number of creditors assented to the resolution is only a circumstance which may be taken into consideration in connection with others in a doubtful case where fraud or gross inadequacy appears. *Ibid.*

A resolution can not be defeated on the mere ground that by the defeat some peculiar benefit may accrue to the objecting creditor. In *re Scott, Collins & Co.*, 15 B. R. 73; s. c. 4 Cent. L. J. 29.

An advance in the percentage is demonstrative of the fact that the original proposition is not for the best interest of all concerned. *Ibid.*

If the requisite proportion signed a resolution, whether the claim of the bankrupt's brother be counted or not, the resolution will be ratified, although that claim consists of debts purchased by him openly and without concealment. In *re Blaney T. Walshe*, 2 Woods, 225.

If there is a concealment of assets or a failure to name all the creditors, this does not necessarily render all the proceedings void; but the question is for the determination of the court. In *re Scott, Collins & Co.*, 15 B. R. 73; s. c. 4 Cent. L. J. 29.

The making of an assignment prior to the commencement of the proceedings in bankruptcy does not preclude the confirmation of the composition, for the composition will discharge the debts, and the creditors will then have no claim on the assigned property under a trust which is terminated. *Pool v. McDonald*, 15 B. R. 560; s. c. 9 C. L. N. 322; s. c. 2 C. L. B. 151.

Where there is no fraud or concealment, the omission to include an asset in the statement is no ground for refusing to confirm the resolution, if the creditors were fully informed concerning it, and its value was such as would not reasonably require an alteration of the terms of the composition. In *re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.

A resolution can not be recorded where the statement of assets and of debts shows that the requisite proportion of creditors have not confirmed it, although the statement is inaccurate. In *re B. C. Asten*, 14 B. R. 7.

If a creditor is induced to vote or sign by any unfair means, whether known to the debtor or not, his vote so influenced operates as a fraud on the other creditors, and makes the composition voidable by any of them. *In re James M. Sawyer*, 14 B. R. 241; s. c. 4 Cent. L. J. 470.

If a vote is influenced by the expectation of advantage, though without any positive promise, this can not be considered an unbiased vote. *Ibid.*

Knowledge that the opposition of a creditor to a composition has been bought off must be imputed to the debtor, unless there is clear and undoubted evidence against it. *Ibid.*

The omission of the court in a voluntary case to adjudicate the debtor a bankrupt, does not defeat a composition made before such adjudication. *In re Aaron Van Anken*, 14 B. R. 425.

Where a composition is made before adjudication, the mere fact that the debtor retains the possession of his assets is no ground for refusing to ratify it. *Ibid.*

A provision that the debtor may retain his assets does not defeat a composition, for it is surplusage, and on the application of a creditor a warrant may be issued, notwithstanding the terms of the provision. *Ibid.*

The fact that the debtor has preferred a creditor does not necessarily prevent the ratification of the resolution. *In re Haskell*, 11 B. R. 164; s. c. 1 Cent. L. J. 531; s. c. 9 Pac. L. R. 36.

If the debtor does not substantially appropriate all his property to pay his creditors pro rata by offering a composition which will pay at least as much as such property can pay, or can reasonably be expected to pay, then the composition is not for the best interest of all concerned, and can not proceed without injustice to the creditors, and will not be confirmed. *In re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.

In the absence of fraud and concealment, the question for the court seems to be not whether the debtor might have offered more, but whether his estate will pay more in bankruptcy. *In re Morris*, 11 B. R. 443; *in re Whipple*, 11 B. R. 524.

The statute does not intend that no debtor can compound with his creditors under this section, who would not be able to obtain a discharge. The law seems to leave it very much to the requisite number and amount of creditors, who, if all the facts are before them, may decide the whole matter. *In re Haskell*, 11 B. R. 164; s. c. 1 Cent. L. J. 531; s. c. 9 Pac. L. R. 36.

A composition providing for a payment or satisfaction in "money," is placed in contradistinction to one for payment or satisfaction in property. It does not prevent the payment of the money in installments. A composition may well provide for successive payments in money at stated future times, but if so there can be no good reason why the stated payments may not be evidenced by notes, to be indorsed if desired, the notes being payable in money. *In re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562; *in re Langdon*, 13 B. R. 60.

A composition which provides for a payment in indorsed notes is defective and will not be ratified. *In re Langdon*, 13 B. R. 60.

Although a resolution provides literally for payment in indorsed notes, yet it will be ratified if it can be construed to mean a payment in cash. In re James T. Hurst, 13 B. R. 455; s. c. 8 C. L. N. 147; s. c. 3 Cent. L. J. 78.

When the notes for the deferred payments are to be indorsed, the resolution should provide for ascertaining the satisfactory character of the indorser, either by naming him or by providing for his being definitely named. In re Reiman & Friedlander, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.

A resolution which provides that the payment of the composition shall be secured by a satisfactory bond to three persons who are styled a committee of the creditors is sufficient. In re Solomon Louis, 14 B. R. 144; s. c. 7 Ben. 481.

A resolution of composition may be confirmed although it does not provide for the expenses of an attachment, if there has been no first meeting of creditors, and no appointment of an assignee. In re W. D. Clapp & Co., 14 B. R. 191.

When the case is before the court for hearing, the court may refer the matter back to the register for inquiry as to any particular fact. In re Blaney T. Walshe, 2 Woods, 225.

When a debtor has had his proposition for a settlement duly considered and passed upon, he should abide by the decision then had, and not be permitted to annoy creditors by requiring their attendance at further meetings. In re McDowell & Co., 10 B. R. 439; s. c. 6 Bliss. 193.

The court should afford all proper facilities for correcting mistakes or enabling the parties most interested to carry out their wishes. Where the failure to accept the offer arose from a failure to properly instruct the attorneys, a new meeting may be called. In re McDowell & Co., 10 B. R. 439; s. c. 6 Bliss. 193.

A defect in the resolution can only be cured by an additional resolution passed in the same way as the original resolution. In re Reiman & Friedlander, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562; in re B. C. Asten, 14 B. R. 7.

A second resolution varying the provisions of a previous resolution can not be recorded until a meeting on notice to all the creditors is called in the same manner as on the original resolution to inquire whether such second resolution has been passed in the manner directed by the statute. In re Reiman & Friedlander, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.

No further recording of the resolution is necessary than to record the decree containing the resolution. Smith v. Engle, 4 B. R. 481; s. c. 9 C. L. N. 46.

Where there has been a composition in an involuntary case before adjudication, it does not necessarily follow that there must be a discontinuance upon the request of the petitioning creditors, after the composition has been confirmed. The matter must be regarded with reference to the status of the property in each case, and the terms of the resolution. In re Thomas McKeon, 11 B. R. 182; s. c. 7 Ben. 513.

If the resolution does not provide for a surrender of the property to the debtor, the property will not be surrendered, if there has been an adjudication of bankruptcy, until the terms of the composition have been complied with. *Ibid.*

If a composition is accepted in an involuntary case prior to an adjudication, the proceedings may be discontinued upon the consent of the debtor and the petitioning creditors, without notice to other creditors. *Ibid.*

The meeting for the purpose of adding to or varying the original proposition is one to follow the confirmation and recording thereof. *In re Scott, Collins & Co.*, 15 B. R. 73; s. c. 4 Cent. L. J. 29.

If a resolution of composition has been duly ratified, it confines the secured creditor to his security and discharges the debtor from personal liability for the secured debt. *In re J. L. Lytle & Co.*, 14 B. R. 457; s. c. 24 Pitts. L. J. 14; s. c. 33 Leg. Int. 349.

If a composition is entered into for cash payments secured by a mortgage on real estate, the district court has no jurisdiction to restrain a creditor from levying an execution on personal property, although the name of such creditor was properly placed on the list of creditors. *Ibid.*

If a debtor after the adoption of a resolution of composition omits to plead it, he is not entitled to relief against the judgment so obtained by an injunction from the district court. *In re Samuel B. Tooker*, 14 B. R. 35.

A composition discharges the debts of those creditors whose names, addresses, and debts are placed on the statement, and no other discharge is needed, for the composition is a substitute for the ordinary proceedings and discharge. *In re Alphonse Bechet*, 12 B. R. 201; s. c. 2 Woods, 173; *in re Knight*, 2 W. N. 479.

If the name and debt of a creditor were placed on the list, the composition will bar the debt, although there was an error in stating the amount. *Beebe v. Pyle*, 1 Abb. N. C. 412.

A composition will not be effective to discharge a debtor, unless the amount agreed upon is actually paid. *James T. Hurst*, 13 B. R. 455; s. c. 8 C. L. N. 147; 3 Cent. L. J. 78; *in re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; s. c. 7 Ben. 455; s. c. 12 Blatch. 562.

Where there is no defect in the proceedings for a composition, the admission of a discharge in evidence does not prejudice the adverse party. *Smith v. Engle*, 4 B. R. 481; s. c. 9 C. L. N. 46.

A decision that a proper proportion of the creditors have confirmed a resolution can not be impeached in a collateral action. *Ibid.*

A decision that a resolution which provides for payment in notes is valid, is conclusive in a collateral action. *Ibid.*

If the jurisdiction of the bankruptcy court is shown to have attached, the subsequent proceedings are presumed to be regular, and its decisions whether correct or otherwise, upon every question properly arising in the case, are binding and conclusive in a collateral action. *Ibid.*

If the notice to creditors of the meeting to consider a proposition of compromise was properly given, the omission to give a proper and sufficient notice to the creditors of the hearing to determine whether the resolution has been properly passed, does not render the order ratifying the resolution void in a collateral action. *Ibid.*

A resolution of composition will be deemed valid in a collateral action, although the signatures of the bankrupt and the creditors in confirmation of the resolution were attached to a separate paper, and not to the resolution itself. *Ibid.*

Where the decree requires the statement of debts and assets to be filed, the presumption in a collateral action is that it was done as directed. *Ibid.*

Where the district court determines that a statement of debts sufficiently states the address of a creditor, the decision is conclusive in a collateral action. *Ibid.*

The ratification of the compromise and the acceptance of payment thereunder do not satisfy the debts in the sense of an absolute extinguishment for all purposes, but release the debtor himself from all further liability thereon, while the remedy against partners, indorsers, and sureties is preserved. *Mason & Hamlin Organ Co. v. Bancroft*, 1 Abb. N. C. 415; s. c. 4 Cent. L. J. 295.

**TITLE X.**  
**DUTIES, PROTECTION AND DISCHARGE OF**  
**BANKRUPTS.**

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ACT OF 1898, CH. 3, § 7. **Duties of Bankrupts.**—(a) The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee.

ACT OF 1867, § 5104. The bankrupt shall at all times, until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated. For neglect or refusal to obey any order of the court, the bankrupt may be committed and punished as for a contempt of court. If the bankrupt is without the district, and unable to return and personally



attend at any of the times or do any of the acts which may be required pursuant to this section, and if it appears that such absence was not caused by willful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted so to do, with like effect as if he had not been in default.

Statute revised — March 2, 1867, ch. 176, § 26, 14 Stat. 529. Prior Statute — April 4, 1800, ch. 19, §§ 21, 33, 2 Stat. 27, 30.

Bankruptcy court has power to order a bankrupt to pay over to the assignee sums which apparently are in his hands. *In re How*, 18 B. R. 565.

Under law of 1867, bankruptcy court had no jurisdiction over property of bankrupt in foreign countries, and could not compel assignment thereof by him. *Phelps v. McDonald*, 16 B. R. 217.

Bankrupt must give satisfactory explanations of deficits which are shown in the assets of his estate, or pay over the amount thereof to the assignee. *In re Peltasohn*, 16 B. R. 265.

Under laws of Alabama, if bankrupt fails to claim his homestead exemption in his schedules he must be deemed to have waived it. *Steele v. Moody*, 16 B. R. 558.

Debtors should, in preparing their schedules, set down in schedule of liabilities all the paper that they may be liable on, with proper explanations in regard to them. *In re Henry, Curran & Co.*, 17 B. R. 463.

If the bankrupt on examination admits the possession of property, he must clearly account for the same to the satisfaction of the court, otherwise he will be held to still have it in his possession and to be able to hand it over to his assignee, and on failing or refusing to account in a reasonable manner for the disposition of the assets which are traced to him, he may be committed for contempt. *In re Salkey & Gerson*, 11 B. R. 423, 516; *s. c.* 6 Biss. 269, 280.

The subjection of the bankrupt and of his property to the court is not for the purpose of punishment in any sense, but to enable the court to enforce a distribution of the bankrupt's estate according to the provisions of the act, and, as a matter of necessity, the law makes the bankrupt, from and after the first preliminary and ex parte adjudication upon the petition, subject to any and all orders that may be deemed necessary under the act to secure such distribution to the creditors. *In re Bromley & Co.*, 3 B. R. 686.

Before a bankrupt can be committed for failing to account for property received by him, it must appear that a reasonable man would not be able to give credit to his evidence, but would be satisfied of its substantial untruth. *In re Joseph Mooney*, 15 B. R. 456.

An uncontested order of the register is an order of the court, and a violation of such order may be punished by commitment for contempt. *In re Horatio N. Allen*, 13 Blatch. 271.

When the contempt is not committed in the presence of the court, the bankrupt may be committed until the further order of the court. *Ibid.*

If the bankrupt is arrested under a warrant of commitment out of the district, he is entitled to be discharged. *Ibid.*

An application for an order to direct the bankrupt to execute certain deeds must be made to the court. The register has no power to pass such an order. *In re Anon.*, 3 B. R. (quarto) 58.

Under the provisions of this clause the court may direct the bankrupt to execute and deliver to the assignee the proper papers to enable him to be admitted to prosecute, in his own name, an action pending in a State court to which the bankrupt is a party, in the same manner and with the like effect as it might have been prosecuted by the bankrupt, and may order the bankrupt to refrain from prosecuting said action, or from applying for any order or decree therein. *In re Clark et al.*, 3 B. R. 491; s. c. 4 Ben. 88.

Where the bankrupt has used due diligence to comply with the orders of the court, he is not guilty of contempt. *In re Carpenter*, 1 B. R. 299.

**ACT OF 1898, CH. 3, § 11. Suits by and against Bankrupts.—**

(a) A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge then until the question of such discharge is determined.

(b) The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

(c) A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

(d) Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

ACT OF 1867, § 5105. No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him, and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby.<sup>1</sup> But a creditor proving his debt or claim shall not be held to have waived his right

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<sup>1</sup> So amended by act of June 22, 1874, ch. 390, § 7, 18 Stat. 179.

of action or suit against the bankrupt where a discharge has been refused or the proceedings have been determined without a discharge.

Statute revised — March 2, 1867, ch. 176, § 21, 14 Stat. 526. Prior Statute — Aug. 19, 1841, ch. 9, § 5, 5 Stat. 444.

This provision does not interfere with the right of any creditor to proceed against the assignee under the bankruptcy to have the benefit of any mortgage, pledge, or other security *pro tanto*, if he elects to do so, or with the right of the assignee to redeem the same. *In re William Christy*, 3 How. 292.

This clause meets and provides for two distinct cases. 1st, For that where the creditor has proved his debt before a suit is commenced. The proving the debt alone is a bar to any suit at law or in equity for the recovery of the debt so proved. 2d. Where the suit has been commenced before the proof of the debt in bankruptcy. In this case the proving of the debt operates as a surrender *ipso jure*, of the action, and is a bar to any further proceedings in the suit. *Everett v. Derby*, 5 Law Rep. 225.

Where defendants in action brought by creditors to set aside fraudulent conveyance of the bankrupt desire to avail themselves of fact that such property had become vested by assignment in an assignee in bankruptcy, the fact of appointment of such assignee must be pleaded as a defense; a plea of discharge is not sufficient to raise the question. *Dewey v. Moyer*, 18 B. R. 114.

Under law of 1867, Held, that jurisdiction of State courts over pending actions is not affected by the adjudication or discharge of a defendant, unless such adjudication or discharge is pleaded. *Serra é Hijo v. Hoffman*, 17 B. R. 124.

The provisions of the bankruptcy law relating to stay of proceedings do not apply to proceedings in appellate courts. *Ibid*.

Under law of 1867, it was held that to entitle the bankrupt to a stay of suit, pending a determination of his discharge, the proceedings in bankruptcy must be pleaded or brought to the knowledge of the court in a proper manner. *Holden v. Sherwood*, 18 B. R. 111.

Also that the mere filing of a petition in bankruptcy was no bar to the prosecution of a suit against him in a statement. *Murphy v. Young*, 18 B. R. 505.

Prior to commencement of the bankruptcy proceedings, a surrogate's decree was docketed against the bankrupt for the payment of moneys misappropriated by him as administrator, and an appeal taken from a decision of the surrogate refusing an application for a commitment of the bankrupt for failure to pay. Upon such appeal, pending the bankruptcy proceedings, decision of surrogate was reversed and the proceedings remitted to him to enforce the proper remedy against the person of the bankrupt. Held, that the proceedings could not be stayed so as to prevent an application to surrogate for a commitment, the debt being one from which a discharge would not relieve the bankrupt, and the remedy of arrest being reserved to creditor. *In re Whitney*, 18 B. R. 563.

Where assignee intervenes at proper time to defend a suit against bankrupt, he has no right to demand a stay of proceedings, nor can he plead a final discharge in bar. The bankruptcy act of 1867 gives these privileges to the bankrupt alone. *Serra é Hijo v. Hoffman*, 17 B. R. 124.

Assignee holds the assets as an officer of the court which appointed him, and his possession and management thereof can not be interfered with by the State courts. *Southern et al. v. Fisher*, 16 B. R. 414.

Where a cause of action pending at time of adjudication is one which passes to assignee, he should be notified, and in case of his refusal the action must be dismissed. *Towle v. Davenport*, 16 B. R. 478.

Assignee of a corporation represents both corporation and its creditors, and defense of irregular organization can not be urged against him. *Chubb v. Upton*, 16 B. R. 537.

Although the assignee may prosecute or defend the suit pending at the time of adjudication, he is not compelled to resort to the State court before which it is pending, but may apply directly to the Federal courts. (Law of 1867.) *Southern et al. v. Fisher*, 16 B. R. 414.

If assignee does not choose to become a party voluntarily to a suit pending in the name of bankrupt, the court in which such suit is pending has no power or authority to make him a party or compel him to submit to its jurisdiction and control. *Serra é Hijo v. Hoffman*, 17 B. R. 124.

Cross-bill setting up defendant's discharge in bankruptcy is not defective in not making the assignee a party, nearly four years having elapsed since appointment of assignee and he has made a final settlement and been discharged. *Phelps v. Curtis*, 16 B. R. 85.

Limitation in bankruptcy act in relation to suits by and against assignees (trustees) applies to a suit in equity brought by assignee of bankrupt corporation to charge the shareholders for the unpaid amount of their shares. *Foreman v. Bigelow*, 18 B. R. 457.

Under law of 1867, a suit to recover debts due the estate was barred by limitation where the summons was not issued within two years from the time when the cause of action accrued, although the petition in such suit was filed within such time. *Walker, Assignee, v. Towner*, 16 B. R. 285.

Where a sale by the assignee took place more than two years after the assignment to him, the limitation of suits by and against assignees prescribed by the bankruptcy act of 1867 can not be set up as a defense to a collateral action brought against the bankrupt by one claiming title under a sale by the assignee. The bankrupt should avail himself of it on application to vacate the sale. *Steele v. Moody*, 16 B. R. 558.

The limitation prescribed by the bankruptcy law (1867) applies only to cases where the right of action accrued after the bankruptcy, and where an adverse interest in or touching any property or right of property is claimed by either of the parties. *Latting v. Fassman et al.*, 17 B. R. 183.

In composition proceedings, when objections are interposed by the minority, whose claims will be discharged against their will, it is the duty of the court to examine those objections fully and carefully. *In re Keller*, 18 B. R. 36.

Under the repealed law, a refusal by the register to proceed further with the examination of the debtor without payment of his fees or security, full opportunity having been given to make such payment or deposit security before closing the examination, affords no ground upon which a creditor can base an opposition to the recording of composition. *In re Tift*, 18 B. R. 227.

As this section is a part of a general system of statutory regulation, it must be read and applied in connection with every other section appertaining to the same features of the general system, so that each and every other section of the act may, if possible, have their due and conjoint effect without repugnancy or inconsistency. *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 13 B. R. 385; s. c. 10 B. R. 355; s. c. 64 Barb. 435; s. c. 53 N. Y. 123; s. c. 91 U. S. 656.

The provision in regard to debts proved must be construed in connection with the clause of section 5117. So much of this section as imposes a penalty for proving a debt, can not be construed as applying to a debt which, by section 5117, is not dischargeable. Such a debt is not surrendered or discharged by proof thereof. *In re W. E. Robinson*, 2 B. R. 342; s. c. 6 Blatch. 253; s. c. 36 How. Pr. 176; s. c. 2 L. T. B. 18; *in re M. Rosenberg*, 2 B. R. 236; s. c. 3 Ben. 14; *in re J. S. Wright*, 2 B. R. 142; s. c. 36 How. Pr. 167; s. c. 2 Ben. 509; *in re Migel*, 2 B. R. 481.

The proof of the debt does not extinguish, but simply suspends the right of action. *Hoyt v. Freel*, 4 B. R. 131; s. c. 8 Abb. Pr. (N. S.) 220; s. c. 2 L. T. B. 144; *Smith v. Dispatch Co.*, 37 N. J. 60; *Hamlin v. Hamlin*, 3 Jones Eq. 191; *Haxtun v. Corse*, 4 Edw. Ch. 585; s. c. 2 Barb. Ch. 506; *Brandon Manuf. Co. v. Frazer*, 13 B. R. 362; s. c. 47 Vt. 88; *Cook v. Coyle*, 113 Mass. 252. *Contra*, *Bennett v. Goldthwaite*, 109 Mass. 494; *Commercial Bank v. Buckner*, 20 How. 108; *Pray v. Torr*, 18 N. H. 188.

The proof of a claim only prevents future proceedings against the bankrupt or his estate. *Ansonia B. & C. Co. v. Babbitt*, 15 N. Y. Supr. 157.

Creditors who have proved their claims are temporarily barred from pursuing their claims against the bankrupt in any other forum. By submitting themselves to the jurisdiction, and becoming parties to the proceedings, they preclude themselves from proceeding against the bankrupt in any other manner, without the leave of the court which has acquired jurisdiction of their claims. They must await the result of the bankrupt's application for his discharge. If it is refused, they are then free to pursue their claims by other means and in other tribunals. If the bankrupt unreasonably delays his application for a discharge, or is guilty of laches in his efforts to bring it to a conclusion, the creditor who has proved his debt is still incapable of proceeding elsewhere, without the permission of the court of bankruptcy. In such a case he must expedite the proceedings in bankruptcy or obtain leave of the bankruptcy court to proceed to collect his debt by due course of law. *Dingee v. Becker*, 9 B. R. 508; s. c. 9 Phila. 196.

If a judgment creditor who has proved his debt issues a *fi. fa.* on his judgment, without first obtaining leave of the bankruptcy court, the *fi. fa.*



will be set aside. *Dingee v. Becker*, 9 B. R. 508; s. c. 9 Phlla. 196; *Frazier v. Banks*, 11 La. An. 31.

If a creditor proves his claim and receives a dividend, a fl. fa. on a judgment subsequently obtained may be set aside if the proceedings in bankruptcy are still pending. *Beckler v. Hambrecht*, 2 W. N. 353.

If a creditor proves his debt, he can not institute an action in a State court while there are funds in the hands of the assignee and before the bankrupt has applied for a discharge. *Wood v. Hazen*, 15 B. R. 491.

If a creditor, who has proved his debt, proceeds subsequently in the State court to obtain an arrest of the debtor, the proceeding may be stayed without affecting the arrest or releasing the bankrupt therefrom. *In re Isidor Goldstein*, 52 How. Pr. 426.

The act of the creditor in proving his debt can not be pleaded in bar of a subsequent action to enforce the claim. *Smith v. Dispatch Co.*, 37 N. J. 60; *Buckner v. Calcote*, 28 Miss. 432. *Contra*, *Wilson v. Capuro*, 4 B. R. 714; s. c. 41 Cal. 545.

The proof of a debt against a corporation does not bar a subsequent action thereon in a State court. *Ansonia Co. v. New Lamp Chimney Co.*, 10 B. R. 355; s. c. 13 B. R. 385; s. c. 64 Barb. 435; s. c. 53 N. Y. 123; s. c. 91 U. S. 656; *Chamberlain v. Huguenot Manuf. Co.*, 118 Mass. 532.

The power of the State courts to proceed with pending suits in cases where creditors have provable debts, but which they do not prove under the proceedings in bankruptcy, is, under certain prescribed limitations, recognized by the bankruptcy act. The jurisdiction of the State courts is not extinguished except in those cases where a creditor proves his debt. Actions pending therein, which were brought by creditors who do not prove their debts, are under the authority of the State courts. They have jurisdiction of the parties and subject-matters, and must determine all questions as they arise, according to law, subject to the final judgment of the Supreme Court of the United States, in case any right or claim is set up under any statute of the United States, and such right or claim is denied by the State tribunals. In no other way can their decisions be reversed or revised. The district court has no control over such suits. *Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325.

There is a distinction between persons and corporations and members thereof, because no discharge can be granted to any corporation or joint-stock company, or any person or officer or other member thereof. The proof of a debt, therefore, does not, per se, prevent the continuance of an action against it. The effect of granting a stay upon an action against a corporation before execution returned, or setting aside an execution issued thereon, the stockholders of which are personally responsible, would be to discharge "a person or officer or member thereof," where such liability must be predicated of a judgment and execution returned unsatisfied, and thus indirectly accomplish what the bankruptcy act declares shall not be attained. *Allen v. Soldiers' Business Messenger & Dispatch Co.*, 4 B. R. 537; s. c. 2 L. T. R. 158; *Shadlington v. Howland*, 53 N. Y. 371; *Ansonia Co. v. New Lamp Chimney Co.*, 10 B. R. 355; s. c. 13 B. R. 385; s. c. 64 Barb. 435; s. c. 53 N. Y. 123; s. c. 91 U. S. 656.

The proof of the debt against the corporation does not bar an action against a stockholder upon his contingent liability. *Shellington v. Howland*, 53 N. Y. 371; *Allen v. Ward*, 36 N. Y. Supr. 296.

The proof of the debt against the corporation is partially equivalent to the commencement and prosecution of an action, and a proximate compliance with such a condition imposed by statute to the liability of the stockholder, if not a substitute for a literal compliance with such condition. *Shellington v. Howland*, 53 N. Y. 371.

When a firm has proved their debt, the resident members may be restrained from further prosecution of a suit in a foreign country. In *re Schepeler & Co.*, 4 Ben. 68.

The court may allow a proof of a debt provisionally, and authorize the continuance of a pending suit for the purpose of liquidation, although the question involved is whether the bankrupt is liable at all upon the contract alleged to have been broken. In *re Jay Cooke & Co.*, 1 W. N. 30.

ACT OF 1867, § 5106. (See *ante*, Act of 1898, ch. 3, § 11, p. 628.)  
— No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed.

Statute revised — March 2, 1867, ch. 176, § 21, 14 Stat. 526.

The object of this section is to prevent a race of diligence between creditors, and to prevent the bankrupt from being harassed with suits while he is proceeding in good faith to obtain his discharge, and until the question of his discharge is determined, and he either obtains it or is refused it. It applies to all cases where the personal liability of the debtor is sought to be fixed or ascertained by a final judgment, pending the determination of the question of his discharge. In *re M. Rosenberg*, 2 B. R. 236; s. c. 3 Ben. 14; in *re Metcalf & Duncan*, 1 B. R. 201; s. c. 2 Ben. 78.

An action to recover a provable debt is to be stayed until a determination is had as to the discharge, whether the debt be one that will be discharged or one that will not be discharged. There is no good reason why the bankruptcy court should enter into the inquiry whether a discharge will operate to discharge any particular debt. The inquiry is one properly to be made only by the court in which a direct suit on the debt is pending,

and whose determination will be a binding judgment on the question between the parties. In *re M. Rosenberg*, 2 B. R. 236; s. c. 3 Ben. 14; in *re Migel*, 2 B. R. 481; in *re Seymour*, 1 B. R. 29; s. c. 1 Ben. 348; in *re W. B. Duncan*, 14 B. R. 18; in *re Henry Schwarz*, 15 B. R. 330; s. c. 52 How. Pr. 513.

Whether a discharge will release a particular debt is a question that can only be determined properly when the discharge is pleaded in an action brought to enforce it. The attempt to determine in advance what the effect will be, when as yet it is not known whether any discharge will be granted, is premature and unnecessary. The act does not in terms prohibit the commencement of a suit to enforce a provable debt. Whenever it appears that the suit is one to which a discharge would be no bar, and that, if not commenced forthwith, the statute of limitations might run against it, or that service might not be obtained upon the bankrupt, or that testimony might be lost, the court may permit the suit to commence for the purpose of saving the statute, effecting a service, or securing testimony. When these objects are attained, the suit can be stayed to await the determination of the question of the debtor's discharge, or the expiration of a reasonable time therefor. But in order to obtain such permission, the creditor must show special reasons; and leave to prosecute will be granted only so far as may be absolutely necessary to secure his rights. In *re Ghiradelli & Co.*, 4 B. R. 164; s. c. 1 Saw. 343; s. c. 2 L. T. B. 135.

When a creditor applies for leave to institute suit against the bankrupt, the court will direct personal service of notice of the application on the bankrupt. In *re George R. Magee*, 1 W. N. 21.

Where there is an unreasonable delay in obtaining a discharge, the court may allow a creditor to institute a suit against the bankrupt, provided that no execution is levied upon any property which belonged to the bankrupt at the commencement of the proceedings in bankruptcy. In *re Chester M. Whiting*, 1 W. N. 30; in *re Samuel S. Scott*, 1 W. N. 30.

The granting of leave to institute a suit by the bankruptcy court is conclusive evidence in a State court that the bankrupt has lost his immunity from suit by misconduct or delay. *Williams v. Whiting*, 1 W. N. 94.

The provisions of this section and the preceding section are addressed quite as much to the State courts as to the bankruptcy tribunals, and are to be applied and enforced by the former quite as much as by the latter. In *re M. Rosenberg*, 2 B. R. 236; s. c. 3 Ben. 14; in *re Metcalf & Duncan*, 1 B. R. 204; s. c. 2 Ben. 78; *Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325; *Delivergne v. Farrard*, 1 Mich. N. P. 90; *Natl. Bank v. Taylor*, 120 Mass. 124. *Contra*, *Garrett v. Carow*, 3 Houst. 352; *Givens v. Robbins*, 5 Ala. 676.

The discharge when granted relates back to the commencement of the proceedings in bankruptcy, and protects all the subsequent acquisitions from coercive appropriation to the satisfaction of antecedent debts. The State courts may, therefore, grant an injunction to protect the bankrupt's property until he can obtain a discharge. *Turner v. Gatewood*, 8 B. Mon. 619; *Mosby v. Steele*, 7 Ala. 299.



If a creditor obtains a judgment after the commencement of the proceedings in bankruptcy, the bankrupt may obtain an injunction restraining proceedings under an execution issued thereon until the question in relation to a discharge is determined. *Keating v. Arthur*, 27 La. An. 570.

In cases of voluntary bankruptcy, an application for a stay may be made as soon as the petition is filed; but no application can be made in cases of involuntary bankruptcy until the order of adjudication is passed. *Maxwell v. Faxton*, 4 B. R. 210; s. c. 18 Pitts. L. J. 107. *Contra*, in re *Bromley & Co.*, 3 B. R. 686.

The objects and purposes of this section are: 1st. That the already acquired property of the bankrupt shall not be subjected to the payment of his debts by means of a judgment recovered after the filing of the petition, or of proceedings had on such judgment. 2d. That the bankrupt shall not be needlessly subjected to actions and suits. 3d. And, perhaps, to enable the bankrupt to claim protection as against such actions and suits through his discharge, if he obtains it. These are the only purposes and objects which the provisions for a stay can, by any possibility, be supposed designed to carry out. But such provisions must be construed in connection with the clause in section 5117, which provides that "no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise." Since it is necessary, in cases of partners and joint contractors, that an action shall be brought against all the partners and all the joint contractors, to proceed against them all, and that the judgment to be rendered shall be a joint judgment against all, unless one or more of them shall have died, or been discharged from the obligation of the contract or indebtedness by operation of law, an action against the bankrupt and certain other parties, upon a joint contract made by them, will not be stayed, but may be prosecuted to judgment, and an order entered staying all proceedings against the bankrupt upon the judgment. This course does not interfere with the attainment of the objects sought by the bankruptcy law. Nor will a stay of the proceedings against the other joint defendants be granted, since the filing of the petition in bankruptcy can not have a greater effect than the discharge. *Hoyt v. Freel*, 4 B. R. 131; s. c. 8 Abb. Pr. (N. S.) 220; s. c. 2 L. T. B. 144; *Givens v. Robbins*, 5 Ala. 676. *Contra*, *Tinkum v. O'Neale*, 5 Nev. 93.

If one of two partners become bankrupt while an action for the conversion of property is pending, the suit may be prosecuted against the other partner, although it is stayed as to the bankrupt. *Hogendobler v. Lyon*, 12 Kans. 276.

Where one partner is bankrupt, the proceedings may be stayed as to him, and a judgment may be entered against the other partner, to be enforced against the partnership property and the property of the solvent partner. *Loomer v. Kintzing*, 1 Mont. 290.

This clause contemplates application by the debtor for a stay under its provision, unless the creditor proves his debt, which operates as a stay, and in strictness he should apply for such a stay. But where he has

omitted to apply for such a stay, and judgment has been rendered against him, he may, nevertheless, interpose his discharge, and obtain a stay of proceedings for an examination supplementary to the judgment founded upon a debt from which he is released by his discharge, on the payment of the costs that accrued in the suit subsequent to the filing of his petition in bankruptcy, and the costs of the motion for such a stay. *World Co. v. Brooks*, 3 B. R. 588; s. c. 7 Abb. Pr. (N. S.) 212.

A stay may be granted although the name of the creditor does not appear upon the proceedings, and no notice thereof has been served upon him. *In re Wm. Archenbraun*, 11 B. R. 149; s. c. 7 C. L. N. 99.

Quære, Do the words "any such suit or proceeding" include something more than any suit at law or in equity? And will they cover any legal mode of enforcing payment of a provable debt? Would a creditor who should undertake to prosecute a proceeding in admiralty, or to seize on execution after-acquired property of the bankrupt, be within the scope, as he clearly would be within the mischief, of this section? If this be so, no creditor holding a provable debt can prosecute any proceedings for its recovery pending the bankruptcy. *Minon v. Van Nostrand*, 4 B. R. 108; s. c. Lowell, 458; s. c. 1 Holmes, 251.

The district court can not stay proceedings upon charges filed with a magistrate, before whom the bankrupt had, prior to the filing of his petition, given his recognizance to appear for examination, under the laws for the relief of poor debtors, in order to release himself from arrest. The bankrupt having, before his bankruptcy, given a recognizance to take the poor debtor's oath, or surrender, and the arrest not being avoided by the bankruptcy, the district court has no right to avoid it indirectly by requiring the proceedings under it and which are instituted at the debtor's instance to be conducted in any particular manner, or to be stayed in part for his further advantage. The filing of the charges does not appear to be a suit or proceeding for the recovery of the debt more than would be a renewal of the execution, or the charging in execution, or any other matter incidental to the lawful arrest. *Ibid*.

A claim in tort for a personal injury can not be stayed, for it is not provable until final judgment is obtained. *In re Hennocksburg & Block*, 7 B. R. 37; s. c. 6 Ben. 159.

If a verdict is rendered in an action for a personal tort prior to the commencement of the proceedings in bankruptcy, the proceedings for the entry of a judgment on the verdict will not be stayed. *Zimmer v. Schlechauf*, 11 B. R. 313; s. c. 115 Mass. 52.

A suit against a corporation will not be stayed. *Meyer v. Aurora Ins. Co.*, 7 B. R. 191.

A proceeding to revive a judgment so that it may operate as a lien on real estate is a proceeding that may be stayed. *Bratton v. Anderson*, 14 B. R. 39; s. c. 5 Rich. (N. S.) 504.

A judgment entered after a motion for a stay of proceedings is erroneous, although it provides that no execution shall issue without a further order of the court. *McKay v. Funk*, 13 B. R. 334; s. c. 37 Iowa, 661.

If a motion is made for a stay of the proceedings in an action to foreclose a mortgage, that portion thereof looking to a personal judgment against the mortgagor should be stayed. *Ibid*.

Where an attachment was issued more than four months before the commencement of the proceedings in bankruptcy, the proceedings for a judgment in rem against the property will not be stayed. *Mason v. Warthens*, 14 B. R. 341; s. c. 7 W. Va. 532.

A proceeding on an attachment issued more than four months before the commencement of the proceedings in bankruptcy may be stayed. *Ray v. Wight*, 14 B. R. 563; s. c. 119 Mass. 426.

The running of the statute of limitations is suspended during the time that proceedings against the debtor may be stayed. *Von Sachs v. Kretz*, 17 N. Y. Supr. 95.

If the creditor institutes his suit within the time limited by the State law, in order to render a stockholder liable for his debt, but is prevented from obtaining a judgment by an injunction issued from the district court at the instance of the stockholders, the latter can not, in a suit against him, object that no judgment has been obtained. *Shellington v. Howland*, 53 N. Y. 371.

The suggestion of bankruptcy is one to be made by the bankrupt. The continuance by the bankruptcy law is to be granted "upon the application of the bankrupt." The plea of a discharge in bankruptcy is a personal one, which the defendant may make, or not, at his own election. If the defendant declines relying upon the privilege granted by the statute, the cause proceeds to trial. If judgment is rendered against him, it is a valid judgment, and is unaffected by his discharge. The plaintiff has no more right to suggest the bankruptcy of the defendant than he has to plead his certificate of discharge, if he obtain one. He can no more file one plea for him than another. The defendant is the judge of his own defense. The suggestion of bankruptcy is not like the suggestion of the death of a party; in that case no valid judgment can be rendered against the deceased. But notwithstanding the defendant's bankruptcy, a valid judgment can be rendered against him, unless he avails himself of the proceedings in bankruptcy. *Palmer v. Merrill*, 57 Me. 28; in *re Leibenstein et al.*, 4 C. L. N. 309.

In Maine it was the intention of the legislature in enacting the act of 1868, ch. 157, that a defendant, whether alone or one of many defendants, taking advantage of his bankruptcy, should not recover costs if the plaintiff should elect to strike his name from the writ. The striking of the defendant's name from the writ is a discontinuance. It is not necessary that the technical term discontinuance should be used. *Severy v. Bartlett*, 57 Me. 416.

It is not the duty of the court to stay proceedings upon being advised that the debtor has filed his petition in bankruptcy, whether asked to do so or not. Courts seldom act as counsel for parties, or thrust legal rights upon them. It is the duty of counsel to present the causes of their clients, and of the courts to pass upon such matters as are presented. *Stone v. Nat'l. Bank*, 39 Ind. 284.

Where the creditor has not proved his claim in bankruptcy, the pendency of the proceedings in bankruptcy can not be pleaded in bar of an action to recover the claim before the debtor's final discharge. *Ibid.*

An affidavit of defense that the defendant has been adjudged bankrupt is sufficient to prevent the entry of a judgment against him until he has a reasonable time to apply for a discharge. *Frostman v. Hicks*, 15 B. R. 41 s. c. 3 W. N. 202; s. c. 24 Pitts. L. J. 80.

A suggestion of the bankruptcy of the appellee on the information and belief of the appellant is not such evidence as will justify any action on the part of the appellate court. *Booker v. Adkins*, 48 Ala. 529.

The motion for a continuance must be properly presented, and an adjudication obtained thereon, before the entry of a judgment. A motion which is not served upon the plaintiff nor brought to the notice of the court is not sufficient. *Dunbar v. Baker*, 104 Mass 211.

When it appears from the record in the appellate court that a cause against several defendants was continued as to some of them, on their plea of bankruptcy, the appellate court will presume that sufficient evidence of the truth of the plea was shown to the court, unless the contrary is made to appear. *Melvin v. Clark*, 45 Ala. 285.

The suggestion of the defendant's bankruptcy operates as an injunction against the further prosecution of the suit, and such further proceedings must be deemed void while the injunction continues. *Penny v. Taylor*, 10 B. R. 200.

This provision is especially addressed to the bankruptcy court, and the stay provided for is to be, and is in practice, granted by that court. The option to endeavor to obtain a discharge, and failing in that, to defend all undetermined personal actions, is a right given to a debtor by the bankruptcy act under the Constitution of the United States, and he is entitled to be protected in that right by the bankruptcy court. In *re M. Rosenberg*, 2 B. R. 236; s. c. 3 Ben. 14; in *re Metcalf & Duncan*, 1 B. R. 201; s. c. 2 Ben. 78; in *re Horatio Reed*, 1 B. R. 1; in *re Jacoby*, 1 B. R. 118; in *re Louis Meyers*, 1 B. R. 581; s. c. 2 Ben. 424; *Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325; *Stinson v. McMurray*, 6 Humph. 339.

This provision was intended for the protection of the debtor. Still it is obvious that the district court has the power to stay creditors from proceeding at all in a State court until the question of discharge is determined. The assignee may apply for the stay, but the granting of the same is a matter resting in the discretion of the court, and will be refused when it would lead to embarrassment and delay. *Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325.

The stay is temporary. The object of the stay is to give time for putting into action the permanent bar to the debt. If the discharge is refused, the stay ceases; its object having been accomplished, and the bankrupt having had an opportunity, unharassed by suits, to endeavor to obtain his discharge. If the discharge is granted, the stay ceases. The bankrupt is then able to plead his discharge in any suit. When the discharge is pleaded, the question of the extent of its operation upon the debts of the bankrupt comes up for determination by the court in which it is pleaded. In *re M. Rosenberg*, 2 B. R. 236; s. c. 3 Ben. 14.

The language of the injunction should be in accordance with the statute. The injunction only continues in force until the question of discharge can be determined. The effect of the discharge is to terminate the injunction. No motion for a dissolution is needed. No order to show the termination is required. The bankrupt must use his discharge as his protection in cases thereby affected. *In re Veeder G. Thomas*, 3 B. R. 38.

If a motion was made for a continuance upon a suggestion of the defendant's bankruptcy before judgment, a discharge may be pleaded on the allowance of a writ of review. *Todd v. Barton*, 13 B. R. 197; s. c. 117 Mass. 291.

If the court is satisfied that the refusal of a continuance on the suggestion of the bankruptcy of the defendant has worked injustice to him, it may in its discretion grant him a review. *Ibid.*

An affirmance of a judgment by an appellate court, where no suggestion of the bankruptcy of the appellant is made, is valid although the proceedings are then pending. *Flanagan v. Pearson*, 14 B. R. 37; s. c. 42 Tex. 1.

If the defendant is adjudged bankrupt after the rendition of a judgment against him in an action of ejectment, this is no ground for staying proceedings in an appellate court. *Alston v. Wingfield*, 53 Ga. 18.

An action pending in the court of appeals of the State, to which an appeal was taken by the bankrupt prior to the commencement of proceedings in bankruptcy, may be stayed. In such a case there is no final judgment within the meaning of the bankruptcy act. A motion for further security in such a suit on the part of the creditor is a proceeding against the bankrupt. *In re Metcalf & Duncan*, 1 B. R. 201; s. c. 2 Ben. 78; *in re Leszynski*, 3 Ben. 487.

A judgment in a subordinate court, from which an appeal is taken, is final in the sense of this section. It is not the purpose of the statute to suspend the right of a plaintiff to maintain in the appellate court the correctness and validity of a judgment from which the bankrupt may choose to take an appeal, until the determination of the question of his discharge. Proceedings in the appellate court will not be stayed when the defendant appeals and then becomes bankrupt. *Merritt v. Glidden*, 5 B. R. 157; s. c. 39 Cal. 559.

If the appellee becomes bankrupt after the submission of the case in the appellate court, the judgment will be rendered as of the date of the submission. *Booker v. Adkins*, 48 Ala. 529.

If the sheriff, acting under an execution issued upon a judgment rendered after the commencement of the proceedings in bankruptcy, proceeds to sell the property after he is served with an injunction from the district court, he may be held liable in an action of trespass for the damages. *Stinson v. McMurray*, 6 Humph. 339; *Turner v. Gatewood*, 8 B. Mon. 613.

Where the action of the creditor does not tend to enforce any demand against the bankrupt, nor deprive the assignee of any property or right, the stay is not violated. *In re Hirsch*, 2 B. R. 3; s. c. 2 Ben. 493; s. c. 1 L. T. B. 92.



The power conferred upon the district court by this section, of granting injunctions to stay suits and proceedings to recover debts from a bankrupt, is not granted to any other court than the "court in bankruptcy," which means the court where the proceedings in bankruptcy are pending. When the bankrupt applies for the benefit of the bankruptcy act in one district, the district court of another district has no power to grant an injunction to stay suits brought by creditors against him. In *re H. Richardson et al.*, 2 B. R. 202; s. c. 2 Ben. 517; s. c. 2 L. T. B. 20.

When the amount of the debt is in dispute, the suit should be allowed to proceed to judgment. In *re Rundle & Jones*, 2 B. R. 113; in *re H. Richardson et al.*, 2 B. R. 202; s. c. 2 Ben. 517; s. c. 2 L. T. B. 20; *Norton v. Switzer*, 93 U. S. 355; s. c. 27 La. An. 25.

So long as the adjudication of bankruptcy stands unrevoked, all inquiry as to the validity or existence of the debt claimed to be due to the petitioning creditor in involuntary proceedings is precluded. The debt due to such creditor was established for the purposes of the adjudication, and neither the debt nor the adjudication can be attacked upon a motion to vacate an order staying proceedings in a State court. In *re Fallon*, 2 B. R. 277.

The order staying proceedings will be vacated when there is unreasonable delay in procuring a discharge. In *re W. Belden*, 6 B. R. 443; s. c. 5 Ben. 476.

A creditor who has not proved his debt has no status in the court of bankruptcy. He does not submit himself to its jurisdiction, and his right to proceed is no farther affected than it is affected by the restraining words of the statute. But this restraint is by the very terms of the statute subject to a condition, and that condition is that the restraint shall not exist if the bankrupt does not use reasonable diligence to obtain his discharge. But the suit can only be stayed by the court in which it is pending. There is no reason for sending him into the court of bankruptcy to apply for permission to proceed. If there has been unreasonable delay, the proceedings in bankruptcy do not arrest his suit, and he has a right to proceed, which has not been surrendered by any act of his, and which the law has not taken away from him. In such a case the question of unreasonable delay must necessarily be a question to be determined by the court in which the creditor's action is pending. *Dingee v. Becker*, 9 B. R. 508; s. c. 9 Phila. 196.

ACT OF 1898, CH. 3, § 9. **Protection and Detention of Bankrupts.**—(a) A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act.

(b) The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

ACT OF 1867, § 5107. No bankrupt shall be liable during the pendency of the proceedings in bankruptcy to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.

Statute revised — March 2, 1867, ch. 176, § 26, 14 Stat. 529. Prior Statute — April 4, 1800, ch. 19, §§ 22, 38, 60, 2 Stat. 27, 32, 35.

If the debt was created by fraud, the bankrupt will not be released from arrest. *In re Martin Alsberg*, 16 B. R. 116.

The right of the debtor to a release from arrest depends on the evidence produced in the district court to prove that the debt is one from which a discharge will not release him, and not upon the reasons which may have been filed in the State court for the arrest. *Ibid*.

A bankrupt arrested under order of arrest granted by a State court in an action founded upon a claim for proceeds of goods consigned for sale as factors: Held, he was entitled to discharge from such arrest, the liability being one which is released by discharge in bankruptcy. *In re Smith et al.*, 18 B. R. 24.

Adjudication of a bankrupt under arrest in a civil action, pending at the time proceedings were commenced, does not entitle him to a release from such arrest. *Brandon Nat'l. Bk. v. Hatch*, 16 B. R. 468.

Bankruptcy law of 1867 did not authorize arrest of a bankrupt in voluntary proceedings. *In re Hale*, 18 B. R. 335.

The district courts are competent to relieve the bankrupt from arrest on process from a State court, provided the arrest was founded upon a debt from which a discharge in bankruptcy would release him. *In re L. Glaser*, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. B. 57; *in re Boyst*, 2 B. R. 171; *State v. Rollins*, 13 Mo. 179; *U. S. v. Dobbins*, 1 Penn. L. J.

91; s. c. 5 Law Rep. 81; in re Milfin, 1 Penn. L. J. 146; in re Grenville T. Winthrop, 5 Law Rep. 24; in re Samuel T. Taylor, 16 B. R. 40. Vide in re Edson Comstock, 22 Vt. 642; Robb v. Powers, 7 Ala. 658.

The district courts must necessarily inquire into that question and decide it for themselves. The question is one of fact, which can not be decided on ex parte testimony. In re L. Glaser, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. B. 57; in re Boyst, 2 B. R. 171.

The proper course is to issue a writ of habeas corpus, and on the hearing to discharge the bankrupt from arrest. In re Williams & McPheeters, 11 B. R. 145; s. c. 6 Biss. 233.

The bankrupt should apply in the first instance to the State court, for that will avoid a conflict of jurisdiction. In re Michael O'Mara, 4 Biss. 506.

Evidence can not be introduced to show that the averments in the declaration upon which the arrest is founded are false. In re Devoe, 2 B. R. 27; s. c. Lowell, 251; s. c. 1 L. T. B. 90; in re J. H. Kimball, 2 B. R. 204, 354; s. c. 2 Ben. 554; s. c. 6 Blatch. 292.

When it appears from the face of the proceedings that the debt is one from which a discharge will not release the debtor, he can not be relieved. It is not necessary that this should appear from the declaration. It is sufficient if it appear from the affidavit and order of arrest, even though these are ex parte. Their verity can not be called in question in the bankruptcy court. They are entitled to as much credit as more formal and specific proceedings. In re J. H. Kimball, 2 B. R. 204, 354; s. c. 2 Ben. 554; s. c. 6 Blatch. 292; in re W. E. Robinson, 2 B. R. 342; s. c. 36 How. Pr. 176; s. c. 6 Blatch. 253; s. c. 2 L. T. B. 18; in re Migel, 2 B. R. 481; in re Leibenstein et al., 4 C. L. N. 309. Contra, in re Williams & McPheeters, 11 B. R. 145; s. c. 6 Biss. 233.

The necessity for an examination by the district court of the papers on which the arrest is founded, is not to determine whether the bankrupt was liable by the State law to arrest, or whether he was arrested on a debt which is in fact not dischargeable, in bankruptcy, but solely to determine whether the State court intended, in ordering the arrest, to found it on a debt or claim which would not be discharged by a discharge in bankruptcy. The distinction is a plain one. If the bankrupt claims that, on the merits, the facts on which the State court acted in ordering his arrest did not exist, he must try that question in the State court. The district court can not go into such an inquiry. It can not try that question on affidavits or by proofs. In re Valk et al., 3 B. R. 278; s. c. 3 Ben. 431.

The bankrupt should move for a discharge in the State court, and controvert the facts on that motion. In re Migel, 2 B. R. 481.

A judgment rendered upon a complaint setting forth all the facts that make up the fraud is conclusive evidence of the fraud. In re Patterson, 1 B. R. 307; s. c. 2 Ben. 155; in re Seymour, 1 B. R. 29; s. c. 1 Ben. 348; in re Pettis, 2 B. R. 44; s. c. 7 A. L. Reg. 695.

A judgment rendered in an action for deceit does not so merge the original cause of action as to make the demand dischargeable. The



record of the action in which the execution issues may be looked at, and if it shows a material and traversable allegation of fraud as its sole foundation, the debt or demand may fairly be said to be one founded in fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge would not release him. *In re Whitehouse*, 4 B. R. 63; s. c. *Lowell*, 429.

But where the debt is one from which a discharge in bankruptcy will not release the bankrupt, he can not be relieved. *In re L. Glaser*, 1 B. R. 336; s. c. 2 Ben. 180; s. c. 1 L. T. B. 57; *in re Patterson*, 1 B. R. 307; s. c. 2 Ben. 155; *in re Seymour*, 1 B. R. 29; s. c. 1 Ben. 348; *in re Pettis*, 2 B. R. 44; s. c. 7 A. L. Reg. 695; *in re G. W. Kimball*, 1 B. R. 198; s. c. 2 Ben. 38; *in re Devoe*, 2 B. R. 27; s. c. *Lowell*, 251; s. c. 1 L. T. B. 90; *Horter v. Harlan*, 7 B. R. 238; s. c. 9 Phila. 63.

Though the State court would probably release the debtor, it is the duty of the district court to see that he is released, and to protect him. *In re Simpson*, 2 B. R. 47; *in re Wiggers*, 2 Biss. 71.

The refusal of a previous application by the State court is not final and binding. *In re Wiggers*, 2 Biss. 71.

It was obviously the object of the law to bring the bankrupt at all times within the control and disposition of the district court, and the State courts can not have control over the bankrupt in a manner different from that authorized by the law. *In re Wiggers*, 2 Biss. 71; *Bishop v. Loewen*, 2 Penn. L. J. 364.

There is no distinction between an arrest on mesne and final process. So far as the arrest is concerned the object and intent of this clause are the same. *In re Wiggers*, 2 Biss. 71; *in re Miffin*, 1 Penn. L. J. 146.

The district court has the power to require a citizen within its jurisdiction to release a person held in custody beyond its jurisdiction. *Hazleton v. Valentine*, 2 B. R. 31; s. c. *Lowell*, 270; s. c. 1 L. T. B. 105.

Rule XXVII applies only to the court in which the proceedings in bankruptcy are pending. *In re Seymour*, 1 B. R. 29; s. c. 1 Ben. 348.

The authority of the district court to release a bankrupt from imprisonment applies only to cases where the arrest is made after the commencement of proceedings in bankruptcy. *In re W. A. Walker*, 1 B. R. 318; s. c. *Lowell*, 222; *Hazleton v. Valentine*, 2 B. R. 31; s. c. *Lowell*, 270; s. c. 1 L. T. B. 105; *Minon v. Van Nostrand*, 4 B. R. 108; s. c. *Lowell*, 458; s. c. 1 *Holmes*, 251; *in re Hoskins*, *Crabbe*, 466; *Schulze v. Fleischer*, 1 Penn. L. J. 11; *in re Rank*, *Crabbe*, 493; *in re Jonathan H. Cheney*, 5 Law Rep. 19.

The arrest contemplated is manifestly a new arrest for the benefit of the creditor. The fact that the debtor was not found guilty by the magistrate in the proceedings before him under the act relating to poor debtors, and was, therefore, permitted to go at large pending the appeal, does not make the taking of his body on execution, in case of his ultimate conviction, a new arrest. So far as the creditor is concerned, it is a restoring of the debtor to the confinement from which he had obtained a temporary relief pending the appeal. It is not an arrest within the contemplation of this clause. *Stockwell v. Silloway*, 100 Mass. 287.

A prisoner out on bail is theoretically and practically in arrest, substantially, to all intents and purposes, the same as if he had not been released on bail. *Hazleton v. Valentine*, 2 B. R. 31; s. c. *Lowell*, 270; s. c. 1 L. T. B. 105; in re *Rank*, *Crabbe*, 493; in re *Jonathan H. Cheney*, 5 Law Rep. 19. Vide *Foxall v. Levi*, 1 Cranch C. C. 139; *Lingan v. Bailey*, 1 Cranch C. C. 112.

The proceeding to discharge a debtor from arrest is very limited in its scope. The action of the district court is confined, in point of time, to the pendency of the proceedings in bankruptcy. They are pending, so far as the debtor is entitled to relief by virtue of the provisions of this section, only until the termination of proceedings for the discharge of the bankrupt. In re *J. H. Kimball*, 2 B. R. 204; s. c. 2 Ben. 554; s. c. 6 Blatch. 292; in re *Nathaniel Dole*, 7 B. R. 538; s. c. 9 B. R. 193; s. c. 11 Blatch. 499.

Where a debtor files his petition in one district, the district court of another district may, in a proper case, release him from arrest under the provisions of section 753. In re *Seymour*, 1 B. R. 29; s. c. 1 Ben. 348.

Proceedings in voluntary bankruptcy by an imprisoned debtor is a fraud upon the State laws, and will prevent his obtaining a discharge under them. An account of his property, which only includes what remains after the assignment in bankruptcy, is defective and insufficient. *People v. Brooks*, 40 How. Pr. 165.

If, prior to being charged in execution, a debtor makes a valid assignment of his property, by filing his petition in bankruptcy, the fact of his having done so will not bar his discharge under the State laws; nor can he be required to assign more than his contingent interest in such property, in the event of its being more than sufficient to pay his debts, or of the bankruptcy proceedings being dismissed or discontinued. *Roswig v. Seymour*, 7 Robt. 427.

The State court will release the party from arrest as well as the district court. *Jones v. Emerson*, 1 Caines. 487.

After the bankrupt has received his discharge, the State court will, on a proper application, release him from arrest. *Comstock v. Grout*, 17 Vt. 512.

A creditor who holds the bankrupt under arrest, upon process issued before the commencement of the proceedings in bankruptcy, will not be permitted to prove his debt, unless he consents to discharge the bankrupt from custody. In re *Jonathan H. Cheney*, 5 Law Rep. 19.

ACT OF 1898, CH. 3, § 14. Discharges, when Granted.—(a) Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

ACT OF 1867, § 5108.<sup>1</sup> At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or, if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and before the final disposition of the cause, the bankrupt may apply to the court for a discharge from his debts. This section shall apply in all cases heretofore or hereafter commenced.

Statute revised — March 2, 1867, ch. 176, § 29, 14 Stat. 531. Prior Statute — Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.

A bankrupt must apply for his discharge before the final disposition of the administration of the estate. *In re Wm. C. Brightman*, 15 B. R. 213.

The law allows the bankrupt to apply for his discharge after the expiration of sixty days from the adjudication, and within six months, either when no debts have been proved, or when no assets have come to the hands of the assignee. It is only when both debts have been proved and assets have come to the hands of the assignee, that the discharge can not be applied for until after the expiration of six months. *In re B. W. & J. H. Woolums*, 1 B. R. 496.

Where, up to the time of the application for the discharge, the assignee has neither received nor paid any moneys on account of the estate, the case is to be regarded as one where no assets have come to his hands, even though he may have reason to believe that he will thereafter receive money on account of the estate as the proceeds out of the assets thereof. *In re Dodge*, 1 B. R. 435; s. c. 2 Ben. 347; *in re Hughes*, 1 B. R. 226; s. c. 2 Ben. 85; s. c. 1 L. T. B. 45.

Certificates of stocks or claims against debtors of the bankrupt, which up to the time of the application of the bankrupt for a discharge have not actually produced anything, and for which the only offer made is the offer of a small sum of money, while there is strong evidence that these stocks and claims are absolutely worthless, may very justly be said not to be assets at the time of the application for a discharge, whatever they may be, or may become afterward. *In re Solis*, 3 B. R. 761; s. c. 4 Ben. 143.

Notes, accounts, and claims against others, on which no money has been received, are not considered as assets. *In re Dodge*, 1 B. R. 435; s. c. 2 Ben. 347; *in re Hughes*, 1 B. R. 226; s. c. 2 Ben. 85; s. c. 1 L. T. B. 45.

The interpretation given to the term "no assets" by the justices of the supreme court, in Form No. 35, is, that the assignee has not received or paid out any money on account of the estate. *In re Dodge*, 1 B. R. 435; s. c. 2 Ben. 347.

It is not necessary, on presenting a petition for discharge, to produce the assignee's return, nor any certificate from the assignee that no assets have come to his hands, nor any other evidence than the mere statement in the petition that no debts have been proved, or that no assets

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<sup>1</sup> So amended by act of July 26, 1876, ch. 234, § 1, 19 Stat. 102.

have come to the hands of the assignee. Of course, upon the return of the order to show cause made upon the bankrupt's application for his discharge, the court will not grant the discharge without satisfactory evidence that no debts have been proved, or that no assets have come to the hands of the assignee. The highest evidence as to debts, and the highest evidence as to assets, are in the hands of the assignee. The evidence, therefore, must come from him. In *re Bellamy*, 1 B. R. 64; s. c. 1 Ben. 390; s. c. 1 L. T. B. 22.

The assignee, when requested by the bankrupt, should make his return on Form No. 35, when he has not in fact received or paid out any money on account of the estate, even though he may have reason to believe that he will, at some future time, receive moneys on account of the same. In *re Hughes*, 1 B. R. 226; s. c. 2 Ben. 85; s. c. 1 L. T. B. 45.

The register has the power to pass an order requiring the assignee to make a return. In *re Bellamy*, 1 B. R. 64; s. c. 1 Ben. 390; s. c. 1 L. T. B. 22.

When debts have been proved, and assets have come to the hands of the assignee, an application for a discharge can not be filed before the expiration of six months from the adjudication of bankruptcy. The six months is to be computed from the date of adjudication — not from the date of filing the original petition. In *re Bodenheilm & Adler*, 2 B. R. 419; s. c. 2 L. T. B. 64; in *re D. K. Holmes*, 14 B. R. 209.

When no debts have been proved and no assets have come to the hands of the assignee, the bankrupt may apply for a discharge even after the expiration of six months. In *re Cannaday*, 3 B. R. 1; s. c. 2 Biss. 75; in *re Vorbeck*, 1 Pac. L. R. 100; in *re Donaldson*, 11 B. R. 460; s. c. 2 Dillon, 346; in *re Wm. H. Pierson*, 10 B. R. 107. Contra, in *re Wilmott*, 2 B. R. 214; in *re Franklin A. Sloan*, 12 B. R. 59; s. c. 13 Blatch. 67; in *re Anson Martin*, 2 B. R. 548; in *re Gallison et al.*, 5 B. R. 353; s. c. 2 L. T. B. 195; in *re Schenck*, 5 B. R. 93; in *re Farrell*, 5 B. R. 125; in *re Barrett*, 11 B. R. 527; s. c. 1 Cent. L. J. 556; in *re Greenfield*, 2 B. R. 298, 311; s. c. 6 Blatch. 287; in *re Watson & Reynolds*, 1 W. N. 86, 334; s. c. 2 W. N. 356; in *re Lowenstein*, 13 B. R. 479; s. c. 3 Dillon, 145.

The fact that the debtor is an involuntary bankrupt does not of itself alone prevent his discharge. If sections 5110 and 5112 do not prevent it, he is entitled to a discharge. In *re S. D. Clark*, 3 B. R. 16; s. c. 2 Biss. 73; in *re Dibblee et al.*, 2 B. R. 617; s. c. 3 Ben. 283; in *re Bunster*, 5 B. R. 82; s. c. 41 How. Pr. 406; s. c. 5 Ben. 242.

The bankrupt is not required to pray for a discharge from his partnership debts in precise words. If he prays to be discharged from all his provable debts, he virtually prays to be discharged from his partnership debts. In *re Wm. H. Pierson*, 10 B. R. 107.

#### ACT OF 1898, CH. 3, § 14. Procedure to Secure Discharge.—

(b) The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable

opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.

(c) The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

Bankrupt must apply for his discharge before final report and discharge of assignee. *In re Cross*, 16 B. R. 294.

A petition for a discharge in bankruptcy should clearly state from what debts the bankrupt desires to be discharged. Where, in involuntary proceedings against one who is a member of a partnership, the bankrupt files his petition for discharge, giving no schedule of firm debts and assets, nor praying for a discharge from firm liabilities, the discharge granted upon such petition will only release him from his individual debts. *Corey v. Perry*, 17 B. R. 147.

Under the law of 1867, where it appeared that the cashier of the objecting creditor (a bank) had recovered judgment in his own name upon the claim proved by the bank; that he had afterward filed a creditor's bill against the debtor and his wife, praying that certain conveyances be set aside as a fraud upon creditors; that his bill was dismissed after a hearing, and upon appeal to supreme court this decree was affirmed: Held, that the matter was *res adjudicata*, as between the objecting creditor and the bankrupt, and that the former was estopped to oppose his discharge. *In re Antisdell*, 18 B. R. 289.

The court of its own motion will not refuse a discharge, though it may appear that the bankrupt has committed an act which, if properly pleaded, would bar discharge. *Ibid*.

Creditors who have been duly notified, and make no opposition, are regarded as consenting to a discharge. *Ibid*.

Where specifications are overruled upon ground personal to the objecting creditor, time may be given to other creditors to appear and oppose the discharge. *Ibid*.

It was objected that the court had no jurisdiction to grant a discharge, on the ground that a prior petition for discharge was still pending and undetermined. Held, that the objection was frivolous; that no discharge could have been granted on the prior petition because not seasonably made, and that the proceedings under it were abandoned when this petition was filed. *In re White et al.*, 18 B. R. 106.

Whenever an objection to a discharge rests on facts, there must be a specification in order that the bankrupt may produce evidence, and that there may be a trial of the fact. *Ibid*.

In order to bar a discharge on the ground that bankrupt swore falsely in the affidavit accompanying his schedules that he was indebted to a creditor named therein, or that he did not disclose to assignee that the claim was false and fictitious, it must appear that he knew the claim was false and fictitious. *In re Blumenthal*, 18 B. R. 555.

If a bankrupt honestly regards a judgment held by him as worthless, he is not chargeable with false swearing or fraud if he omit it from his schedule, even if he consider it as having a value. The omission must be intentional. *In re Winsor*, 16 B. R. 152.

Keeping books of account, within meaning of the bankruptcy act, is the keeping of an intelligent record of the merchant or tradesman's affairs, and with that reasonable degree of accuracy and care which is to be expected from an intelligent man in that business, and a casual mistake therein will not prevent a discharge. *Ibid*.

It is not required that a chattel mortgage given to secure a debt should be entered upon a merchant's or trader's books. Entry of notes upon the fly-leaf of the blotter sufficient. *Ibid*.

Requirement that bankrupt shall keep proper books of account is satisfied if his creditors can gather from them a correct understanding of his business and financial condition. *In re Antisdel*, 18 B. R. 289.

A discharge will not be refused upon the ground of material erasures and alterations in such books, unless they appear to have been made with fraudulent intent. *Ibid*.

Bankrupt kept proper books of account with his customers, but it was conceded that he kept no books showing the transactions between himself and S. Held, that his dealings with S. were just as much a part of his business, within meaning of the statutes, as his dealings with his customers. *In re Blumenthal*, 18 B. R. 555.

Bankrupt carried on the business of butchering, as agent and salesman for one S., under a contract which provided that he should account daily with S., and pay over moneys received until S. was reimbursed for his outlay. The transactions between bankrupt and S. were entered daily by bookkeeper of S. in a pass-book, which was kept in bankrupt's possession. Held, such pass-book was one of bankrupt's books, and proper within meaning of statute. *In re Blumenthal*, 18 B. R. 575.

A merchant or trader who prior to becoming such kept books of account showing state of his affairs is not required to carry their contents, or any part of them, into his books opened and kept as a trader, in order to satisfy requirements of the statute. *In re Winsor*, 16 B. R. 152.

A bankrupt who has received his final discharge is entitled to his future acquisitions, and may use them to purchase his former assets on a sale thereof by the assignee. *Phelps, Assignee, v. McDonald*, 16 B. R. 217.

Provable debts, though created by fraud, are discharged by a composition in bankruptcy. *Wells v. Lamprey*, 16 B. R. 205; *in re Shafer & Wesselhoeft*, 17 B. R. 116.

Where an insolvent has been legally released from his obligations by a composition with his creditors, the debt of one of such creditors who accepted the composition on the written condition that none of the other

creditors should receive better terms, is not revived by the payment, after such release of additional sums to other creditors. In *re Sturgis*, 16 B. R. 304.

Where in a composition proceeding the statement of liabilities represents a claim as being fully secured, and the creditor is in attendance but does not participate in the proceedings nor raise any objection to such representation, the claim is not discharged by the composition, but the creditor is entitled to the percentage agreed upon in such proceeding on the deficit left unpaid on realizing such security whenever ascertained. *Paret v. Ticknor et al.*, 16 B. R. 315.

Defendants who were indorsers of a promissory note were adjudged bankrupt before its maturity, and proposed a composition of fifty cents on the dollar, which was accepted, the note being entered on their schedule as held by the party from whom plaintiff had received it, plaintiff having no knowledge of the proceeding and not assenting thereto. After maturity of the note the makers were adjudged bankrupt, and offered a composition of fifty per cent. to the creditors, including plaintiff, which was accepted and duly performed. Defendants then offered to pay fifty-five per cent. of the balance remaining due, which was refused. Held, plaintiff was entitled to its double security; that as the note was not provable in bankruptcy before maturity it could not be satisfied by the composition, and that even if it could, the defendants having refused to pay according to their composition, could not protect themselves by it from an action at law. *Nat. Mt. Wollaston Bk. v. Porter*, 17 B. R. 329.

After lapse of one or two years it was held, under law of 1867, that creditors could not be heard to set aside a composition where, pending the composition, suspicious circumstances appeared showing votes of creditors to have been purchased, and the complaining creditors made no inquiry as to the facts, but accepted the settlement. In *re Herman*, 17 B. R. 440.

Discharge by virtue of compliance with terms of a composition is a discharge by operation of law, and an indebtedness thus discharged is a sufficient consideration for a new and express promise to pay the original debt. In *re Merriman's Estate*, 18 B. R. 411.

Where the names and addresses of the judgment creditors, with the amount of their judgment, were stated in the statement of debts and assets presented by the debtors at the meeting of creditors at which the composition was adopted, and they were tendered the composition percentage on the full amount of their judgment; Held, that although they were secured creditors to the extent of their lien upon the land, that lien being acquired prior to the commencement of the bankruptcy proceedings, and to that extent were not affected by the composition, yet they were so far bound by it that they were not entitled to take any steps to acquire new liens, and their judgment was extinguished except as to their right to enforce the liens already acquired. *Conover et al. v. Dumahaut et al.*, 17 B. R. 558.

Defendants, who were indorsers upon a promissory note, filed a voluntary petition before its maturity, and proposed a composition, which was

accepted. The holders in no way participated in the proceedings, which were terminated before the note matured. The composition percentage was tendered to the holders in due time, but was rejected. In an action upon the note after maturity: Held, that defendants were liable for the full amount thereof; that their contingent liability was not affected by the composition. *Smith v. Krauskopf*, 18 B. R. 6.

A composition in bankruptcy operates as a satisfaction of debts that were fraudulently contracted. *Bamberg v. Stern*, 18 B. R. 74.

Where a resolution of composition provides that it should be consummated within a limited time or be void; Held, that such agreement was not absolute, but would be void if not consummated as to all of the creditors within the time limited. *Evans et al., v. Gallantine*, 18 B. R. 311.

And where, in an action by a creditor upon his original claim, the defendant set up as an answer such composition agreement, and that he had performed such agreement as to plaintiff within the time specified: Held, that the answer was insufficient for want of an averment that such agreement was duly consummated as to all of the creditors. *Ibid.*

A composition in bankruptcy does not become effective (Law of 1867, as amended 1874) so as to discharge the debtor from his debts until the composition notes are paid, and if a note given to a creditor agreeing to the composition is not paid when due, he can sue for the original debt, and is entitled to his pro rata proportion under an assignment for the benefit of creditors, if one has been made. *In re Assignment of Leipziger*, 18 B. R. 264.

Where a creditor has proved his claim in bankruptcy, voted on a resolution of composition, and accepted his pro rata share in money and promissory notes given in pursuance of said composition to secure payment of future installments, he cannot sue upon his original debt in a State court, although the debtor has made default in payment of one of the installments. *Deford et al. v. Hewlett*, 18 B. R. 518.

Where a debtor who had been discharged under composition proceedings in bankruptcy gave one of his creditors who had signed the resolution a new note for his old debt, and afterward again went into bankruptcy: Held, that the claim so revived should not be postponed to those of the new creditors. *In re Merriman's Estate*, 18 B. R. 411.

ACT OF 1867, § 5109. Upon application for a discharge being made, the court shall order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt.

Statute revised — March 2, 1867, ch. 176, § 29, 14 Stat. 531. Prior Statute — Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.



The register may pass the order to give notice to the creditors to appear and show cause against the discharge of the bankrupt. In *re Gettle-son*, 1 B. R. 604. Contra, but he may, if the court authorizes him to do so. In *re Bellamy*, 1 B. R. 64, 96, 113; s. c. 1 Ben. 390, 426, 474; s. c. 1 L. T. B. 22.

The order in Form No. 51, although the register is to direct it to be issued, is to have the signature of the clerk and the seal of the court. It may be made returnable before the court at the office of the register. It should name the newspapers in which the notice is to be published. The selection of the newspapers is to be made with due regard to the requirements of this section, and from among the newspapers named in the rules of the court in bankruptcy. In *re Bellamy*, 1 B. R. 64, 113; s. c. 1 Ben. 426, 474.

If the bankrupt does not apply for his discharge within three months, the notice need not say anything about the second and third meetings of creditors. *Anon.*, 1 B. R. 219.

The notices are to be sent only to the creditors who have proved their debts. In *re McIntyre*, 1 B. R. 151; s. c. 1 Ben. 543; *Morse v. Presby*, 25 N. H. 299.

If no creditors have proved their debts, the publication is the only notice required by the law. *Anon.*, 1 B. R. 123.

The notices are to be sent by the clerk. The clerk's certificate that the notices have been duly mailed is sufficient evidence of the fact. In *re Bellamy*, 1 B. R. 64, 113; s. c. 1 Ben. 426, 474; in *re Townsend*, 1 B. R. 216; s. c. 2 Ben. 62; s. c. 1 L. T. B. 2.

A formal judicial process and return is not necessary. The service may be by letter. *Linton v. Stanton*, 4 La. An. 401; *Beach v. Miller*, 15 La. An. 601.

The register should transmit to the clerk a list of all the proofs of debts which have been furnished to the register or the assignee, containing the names, residences and post-office addresses of the creditors with sufficient particularity to enable the notices to be served properly. In *re Bellamy*, 1 B. R. 113; s. c. 1 Ben. 474.

If the assignee refuses to give a certificate of the names of the creditors who have proved their debts, the register, upon the application of the bankrupt, has the power to pass an order directing the assignee to furnish such certificate, and it is the duty of the assignee to comply with it. In *re Blaisdell et al.*, 6 B. R. 78; s. c. 42 How. Pr. 274; s. c. 5 Ben. 420.

The proof of publication may be by the usual affidavit of the printer. In *re Bellamy*, 1 B. R. 96; s. c. 1 Ben. 426.

The allegation in the record that due proofs of the publication of the notices were given, can not be impeached in a collateral action. *Linton v. Stanton*, 4 La. An. 401.

ACT OF 1898, CH. 3, § 14. **Applicant Entitled to Discharge.**—  
(b) The judge shall discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition

and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.

ACT OF 1867, § 5110. No discharge (a) shall be granted, or, if granted shall be valid in any of the following cases:

First. If the bankrupt has willfully (b) sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceeding in bankruptcy, in relation to any material fact.

Second. If the bankrupt has concealed (c) any part of his estate or effects, or any books or writings relating thereto; or has been guilty of any fraud or negligence in the care, custody, (d) or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this Title, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof.

Third. If, within four months before the commencement of such proceedings, the bankrupt has procured his lands, goods, money or chattels to be attached, (e) sequestered, or seized on execution.

Fourth. If, at any time after (f) the second day of March, eighteen hundred and sixty-seven, the bankrupt has destroyed, mutilated, altered, (g) or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; or has removed (h) or caused to be removed any part of his property from the district, with intent to defraud his creditors.

Fifth. If the bankrupt has given any fraudulent (i) preference contrary to the provisions of the act of March two, eighteen hundred and sixty-seven, to establish a uniform system of bankruptcy, or to the provisions of this Title, or has made any fraudulent (j) payment, gift, transfer, conveyance, or assignment of any part of his property, or has lost any part thereof in gaming, (k) or has admitted (l) a false or fictitious debt against his estate.

Sixth. If the bankrupt, having knowledge that any person has proved such false or fictitious debt, has not disclosed the same to his assignee within one month after such knowledge.

Seventh. If the bankrupt, being a merchant or tradesman, has not, at all times after the second day of March, eighteen hundred and sixty-seven, kept proper books (m) of account.

Eighth. If the bankrupt, or any person in his behalf, has procured the assent (n) of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation.

Ninth. If the bankrupt has, in contemplation (o) of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed in satisfaction of his debts.

Tenth. If the bankrupt has been convicted of any misdemeanor under this Title.

Statute revised — March 2, 1867, ch. 176, § 29, 14 Stat. 531. Prior Statutes — April 4, 1800, ch. 19, §§ 36, 37, 2 Stat. 31; Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.

**Grounds for Withholding a Discharge.**—(a) The acts enumerated in this section are not in the nature of offenses, created and defined by the bankruptcy law, the penalty for the commission of which by the bankrupt is the forfeiture of his right to a discharge. The bankruptcy act was intended to operate, and has been uniformly held to operate upon and provide for the discharge of debts created before as well as after its passage, and in respect to debts contracted before its passage, it is clearly a retrospective and retroactive law so far as it authorizes the discharge of such prior debts. Prior to the passage of the act, the debtor had no right to a discharge from such debts, and he now has no right to such discharge except in the cases provided for, and upon the conditions prescribed in the act. These provisions create no offenses, and there is no forfeiture of an existing right denounced as the penalty for a newly-created offense, for the simple and obvious reason that a right to a discharge in the cases provided for did not exist when the act was passed, and therefore the provisions are not retroactive or retrospective in the proper sense of those terms. The act gives a debtor a right to a discharge, provided he fully complies with its provisions, and is not brought within the limitations, exceptions, or prohibitory provisions of the act, and, as this right only exists by virtue of the bankruptcy act, the provisions of this section are only exceptions in restriction or limitation of the grant of power to the bankruptcy court, under which grant alone a debtor can, in any case not excepted from its operation, assert a right to a discharge. In *re Cretlew*, 5 B. R. 423; s. c. 2 L. T. B. 137.

Congress has an undoubted right to annex such conditions as it chooses to the grant of a discharge. Such a condition is not a punishment nor retroactive. It is simply a condition precedent. In *re Goodfellow*, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69.

The question of withholding a discharge for any of the reasons specified in this section, when the bankrupt has taken the required oath, and has conformed to all the modal requirements of the bankruptcy act, is one wherein the creditors are the attacking party. If they do not enter an appearance, and file specifications, they are regarded as not opposing the discharge, and as assenting to it, and the grounds for withholding a discharge specified in this section are regarded as not existing in respect to the particular bankrupt. In *re Schuyler*, 2 B. R. 549; s. c. 3 Ben. 200; s. c. 2 L. T. B. 85; in *re Rosenfield*, 2 B. R. 117; s. c. 8 A. L. Reg. 44; s. c. 1 L. T. B. 100.

If the formal requirements of the bankruptcy act have been complied with, a discharge is only to be refused for some grounds set forth in this section. The fact that the debt of the creditor is a fiduciary debt, is no ground for withholding a discharge. In *re Elliott*, 2 B. R. 110; in *re Tracy et al.*, 2 B. R. 298; *Chapman v. Forsyth*, 2 How. 202; in *re George Brown*, 5 Law Rep. 258; in *re John C. Tebbets*, 5 Law Rep. 259; in *re Levi H. Young*, 5 Law Rep. 128. Vide in *re Parker et al.*, 1 Penn. L. J. 370; in *re John Hardison*, 5 Law Rep. 255; in *re Hezekiah Cease*, 5 Law Rep. 408.

Fraud in the creation of a debt is no ground for withholding a discharge. In *re Rathbone*, 1 B. R. 324; s. c. 2 Ben. 138; in *re Rosenfield*, 1 B. R. 575; s. c. 1 L. T. B. 100; in *re Wright et al.*, 2 B. R. 41; s. c. 15 Pitts. L. J. 553; in *re Bashford*, 2 B. R. 73; in *re Clarke*, 2 B. R. 110; in *re Doody*, 2 B. R. 201; in *re Stokes*, 2 B. R. 212.

Neither the purchase of goods when the bankrupt knew that he could not pay for them, nor the fraudulent purchase of a piano, are within the act. The frauds which prevent a discharge are, nearly all, such as tend to the injury of creditors generally. One who has been induced, by fraudulent representations, to sell goods to the bankrupt, finds his remedy in the right to receive a dividend, and to hold the remainder of his debt undischarged by the certificate. Any fraud on the act may be given in evidence, including all that are mentioned in section 5132. In *re W. M. Rogers*, 3 B. R. 564; s. c. Lowell, 423.

The fact that the assignee, by inadvertence or mistake, has set apart to the bankrupt certain property as exempt, which is not exempt by law, and which should be subject to his creditors, is no ground for opposing the discharge. The propriety of the assignee's action in this respect should have been contested at the proper time, and in the proper manner. In *re Eidom*, 3 B. R. 106.

The question of the residence or place of business of the bankrupt may be made the ground for opposing the discharge. The question whether the petition is filed in the proper district is a question of jurisdiction. If the court does not have jurisdiction, it can not grant a discharge. In *re Little*, 2 B. R. 294; s. c. 3 Ben. 25; in *re Penn et al.*, 3 B. R. 582; s. c. 4 Ben. 99; in *re Leighton*, 5 B. R. 95. Contra, it should be charged that the bankrupt has willfully sworn falsely in relation thereto. The false oath may be made the ground for withholding the discharge. In *re Burk*, 3 B. R. 296; s. c. 1 Deady, 425; s. c. 2 L. T. B. 45.

An averment that the bankrupt has not resided or carried on business in the district where the petition is filed for six months next preceding the filing of the petition, is too broad. It may be true, and yet the bankrupt may be entitled to his discharge. It is only necessary that he should have been in the district for the longest period during that six months. *In re Burk*, 3 B. R. 296; s. c. 1 Deady, 425; s. c. 2 L. T. B. 45.

A specification which alleges that the bankrupt's assets are not equal to thirty per cent. of the claims proved against his estate upon which he is liable as principal debtor, without alleging that the consent of one-fourth in number and one-third in value of the creditors holding such debts, was not filed before or at the hearing upon the order to show cause, is insufficient. The question, however, may be presented by the opposing creditor, or any other creditor, upon the hearing before the register on the reference of the general question, whether the bankrupt is entitled to the discharge. *In re Cretlew*, 5 B. R. 423; s. c. 2 L. T. B. 137.

**Willful Perjury.**—(b) The specification must aver that the false oath was willful. Omissions in the schedules must be alleged to have been intentional. A false oath on examination must be alleged to have been willful, and in regard to a material fact. *In re Rathbone*, 1 B. R. 324; s. c. 2 Ben. 138; *in re Beardsley*, 1 B. R. 304; *in re Wyatt*, 2 B. R. 288; *in re Sidle*, 2 B. R. 220; *in re Robinson et al.*, 3 B. R. 70; *in re Wm. H. Pierson*, 10 B. R. 107; *in re John C. Tebbets*, 5 Law Rep. 259; *in re Robert H. Shoemaker*, 4 Biss. 245; *in re Wm. Archenbraun*, 12 B. R. 17; s. c. 7 C. L. N. 231.

An allegation that the bankrupt willfully omitted property from his schedule is entirely insufficient, for the reason that it does not allege that the bankrupt willfully swore falsely in his affidavit annexed to his schedule or inventory. *In re Keefer*, 4 B. R. 389; s. c. 3 C. L. N. 125.

The causes for withholding a discharge are some act omitted which was required to be done, or some act done which was forbidden, and these acts must have been in fraud of the law. Mere oversight or mistake is not sufficient; these are infirmities to which all are liable, and for the correction of which ample remedy is afforded to all parties. *In re McVey*, 2 B. R. 257; *in re Smith & Bickford*, 5 B. R. 20.

If the bankrupt has willfully sworn falsely in omitting the name of a creditor from his schedules, the discharge will be refused. It is questionable, however, whether the act ought not to be so construed that this objection can only be made by a creditor who is interested in the debt, which is the subject of the misconduct of the bankrupt, or who is or may be injured by the omission or falsehood concerning it. *In re Kallish*, 1 Deady, 575.

The omission of the name of a creditor from the schedule with his consent can not be availed of by other creditors whom it has not injured as a willful falsehood. It is not a willful and fraudulent omission if made with the assent of the creditor, express or implied, antecedent or subsequent. This does not apply to a case where fraud or injury is proved. *In re Needham*, 2 B. R. 387; s. c. Lowell, 309; s. c. 2 L. T. B. 39.

It must be proved that the taking of a false oath was intentional. The omission to place upon the schedules property in which it can not be positively determined whether the bankrupt has any interest or not, is no ground for withholding the discharge. In *re Wyatt*, 2 B. R. 288; in *re Penn et al.*, 5 B. R. 288; s. c. 2 L. T. B. 193; in *re Smith*, 13 B. R. 256; s. c. 1 Woods, 478.

Where a bankrupt is informed that a certain debt exists, by his partner, who had exclusive management of the business to which that debt relates, he has the right to believe the statement to be true, and to place it upon his schedules. In *re Schofield et al.*, 3 B. R. 551.

Transactions entered into in blind confidence may be explained by the manifest presence of good faith. In *re Beatty et al.*, 2 B. R. 582; s. c. 3 Ben. 233.

There is a distinction between willfully swearing false and the crime of perjury. Perjury is the willfully and corruptly swearing false. Corruption is an element of crime. The advice of counsel may shield a client from corrupt intent, but can not relieve him from the fact that he actually intended what he did. In *re Rainsford*, 5 B. R. 381.

**Concealment of Property.**—(c) The specification should state with some particularity what property has been concealed. In *re Mawson*, 1 B. R. 437; s. c. 2 Ben. 332; in *re Rathbone*, 1 B. R. 324; s. c. 2 Ben. 138; in *re Beardsley*, 1 B. R. 304; in *re Freeman*, 4 B. R. 64; s. c. 4 Ben. 245.

A mere allegation in general terms that the bankrupt failed to file a full schedule of the notes and accounts held by him, without specifying which were omitted, is insufficient. *Stewart v. Hargrove*, 23 Ala. 429.

An allegation of concealment should state how and in what manner the concealment was effected. *Brereton v. Hull*, 1 Denio, 75.

An allegation of a concealment of an interest in a firm should show that the bankrupt had an interest in the firm assets, and that there was something due to him. *Dresser v. Brooks*, 3 Barb. 429.

An allegation of concealment which describes certain property, and charges the concealment of other property without any description whatever, either as to kind or quality, is bad, but will not vitiate the whole specifications. The bankrupt should not demur, but on the trial should object to any evidence that may be offered under the general words. *Brereton v. Hull*, 1 Denio, 75.

The term "concealment" implies something willful, intentional. One can not be said to conceal property, unless he not only knows that he owns it, but unless he also intentionally, not inadvertently, conceals the same from his assignees or creditors. The act of concealment must be shown to be intentional. In *re Wyatt*, 2 B. R. 288; in *re George Wilson*, 6 Law Rep. 272; in *re Mark Banks*, 1 N. Y. Leg. Obs. 274; *Dresser v. Brooks*, 3 Barb. 429.

The language of the law means to hide, to secrete. Where a man owns property of which he has no knowledge, the fact that he did not put it on his schedules will not prevent his discharge. In *re Renslow S. Parker*, 4 Biss. 501.

A mere failure on the part of the bankrupt to render in property possessed by him, on his schedules, is not made a ground by the act for refusing his discharge. The act does make the concealment of the same a ground for such action; but then it must be averred and proved that it was willful. The allegation of the time when the bankrupt had possession of the property should be definite. *In re Eldom*, 3 B. R. 106; *in re Connell*, 3 B. R. 443; *in re Smith*, 13 B. R. 256; s. c. 1 Woods, 478.

An omission of property by accident or mistake will not prevent a discharge. *Loud v. Pierce*, 25 Me. 233; *Suydam v. Walker*, 16 Ohio, 122; *Crooker v. Trevett*, 28 Me. 271.

A bankrupt can not be held to be guilty of a willful concealment of property, by omitting to specify in his schedule a mass of obsolete and worthless demands, upon which no action whatever can be maintained. *In re Alonzo Pearce*, 21 Vt. 611.

A concealment of property from a person entitled to its possession is not the less a concealment because he knows that it is concealed, if he does not also know where it is concealed. *In re Beal*, 2 B. R. 587; s. c. Lowell, 323; s. c. 2 L. T. B. 95.

The concealment denounced by this section embraces a concealment of title to property, as well as the hiding from view of property itself. What matters it to the creditors that the property may be seen by all men, if the debtor's right to it is concealed? Undoubtedly, concealment of property may be effected by the literal hiding of it. But the most dangerous sort of concealment is when the debtor places the title to property in the hands of another person to hold for his benefit, and conceals his beneficial right to it. Either kind of concealment will preclude the granting of a discharge. *In re Hussmann*, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 O. L. N. 177; *Edwards v. Gibbs*, 39 Miss. 166.

It is a concealment to leave out of the schedule property that has been conveyed by the bankrupt in fraud of creditors. It is wholly immaterial that the title, as between vendor and vendee, vested in the vendee. As to creditors, the conveyance was void, and the title remained in the vendor. Concealment is a continuous act. *In re Hussmann*, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 O. L. N. 177; *in re Rathbone*, 1 B. R. 536; 2 B. R. 260; s. c. 3 Ben. 50; s. c. 1 L. T. B. 70, 114; *in re W. D. Hill*, 1 B. R. 431; s. c. 2 Ben. 349; s. c. 1 L. T. B. 56; *in re Goodridge*, 2 B. R. 324; *in re Goodfellow*, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69; *Peterson v. Spear*, 29 Penn. 478; *Kling v. Dietz*, 12 Penn. 156. *Contra*, *State v. Bethune*, 8 Ired. 139; *Porter v. Douglass*, 27 Miss. 379; *in re David H. Robertson*, 1 N. Y. Leg. Obs. 20; *in re John Q. McCarty*, 5 Law Rep. 322.

A fraudulent conveyance made by a debtor anterior to the passage of the act will not of itself preclude his discharge, but in such case he should not conceal nor attempt to conceal the fraud when he seeks the benefit of the statute. He must come into court with clean hands, or at least with a clear conscience, and disclose fully all property and rights of property which the creditors may appropriate in satisfaction of their claims.

In re Hussmann, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 O. L. N. 177; in re Rainsford, 5 B. R. 381.

If property which had been conveyed to defraud creditors was sold in good faith, and the purchase money paid to the bankrupt or his creditors before the commencement of proceedings in bankruptcy, there is no concealment of assets by omitting it from the schedules. In re J. H. C. Lutgens, 7 Pac. L. R. 89.

When property is, in fact, concealed, in specie, or where the title is concealed by a colorable conveyance, the discharge can not be granted: but there are many doubtful cases, in which justice seems to demand that the assignee should be entitled to try his rights, but in which unfairness on the debtor's part can not be made out. An open and notorious conveyance of property from the bankrupt to his wife, made long before the commencement of proceedings in bankruptcy, and at a time when he is alleged to have been solvent, is no ground for withholding a discharge. Such a conveyance does not stand on the footing of a mere voluntary conveyance to a stranger, or of one made on a secret trust for the grantor. No doubt the debtor has always had, and always will have, some advantage from it, but it would be a perversion of terms to say that there was any concealment about it. Whether the conveyance can be avoided by the assignee is a different question. In re Murdock, 3 B. R. 146; s. c. Lowell, 362; s. c. 2 L. T. B. 97.

A transfer of property from the bankrupt to his wife, at the time when he was insolvent, but believed himself to be solvent, may be a good ground for refusing a discharge. If he surrenders the property as soon as the mistake is discovered, he will stand in a favorable condition; but if he does not do so, nor make any attempt to repair the error, it will be difficult to believe that the transfer was a mere mistake. In re R. A. Adams, 3 B. R. 561.

The keeping of books from the assignee involves the question of intent. If the books were accidentally lost before the bankruptcy, there can have been no such concealment. If they were not lost, but within the control of the bankrupt, and not given up on demand, with intent to prevent the assignee from obtaining them, but their existence denied, the charge of concealment is sustained. It is not necessary that they should have been put in any unusual or out-of-the-way place. In re Hammond & Coolidge, 3 B. R. 273; s. c. Lowell, 381.

A judgment rendered in a suit instituted in a State court to which the opposing creditors and the bankrupt were parties, and in which the fraudulent character of the conveyance was litigated and determined is conclusive. In re Hussmann, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 C. L. N. 177.

Concealment of property involves not only the charge of gross fraud, but also the crime of false swearing, and it ought to be substantiated either by direct testimony, or by such facts as afford unequivocal circumstantial evidence of it. It certainly ought not to be taken to be true upon any slight or ambiguous presumptions, nor upon any state of facts which does



not clearly, and indeed almost necessarily, call for such an inference. *Rugely v. Robinson*, 19 Ala. 404; *State v. Bethune*, 8 Ired. 139; in re *Alonzo Pearce*, 21 Vt. 611; *Loud v. Pierce*, 25 Me. 233; *Carey v. Esty*, 29 Me. 154; in re *John Q. McCarty*, 5 Law Rep. 322; in re *Chas. H. Delavan*, 5 Law Rep. 370.

Fraud by concealing assets is one that can seldom be proved by other than circumstantial evidence. The parties to the transaction are generally the only witnesses, and if their stories are to be believed as told, no fraud can be established. External evidence is not to be had, and the truth must be reached by examining the evidence of the alleged parties to the fraud, and weighing its probabilities, and scrutinizing its general tenor and manner. Of course, those who would commit a fraud would swear falsely to carry it through. If their positive testimony to the honesty of the transaction is overborne by badges and indicia of fraud, the conclusion must be that there was fraud. If their positive testimony to the honesty of the transaction is true, there will not be found in their testimony any badges and indicia of fraud sufficient to overbear such positive testimony. In re *Goodridge*, 2 B. R. 324; in re *Rathbone*, 1 B. R. 536; s. c. 2 B. R. 260; s. c. 3 Ben. 50; s. c. 1 L. T. B. 70, 114; in re *W. D. Hill*, 1 B. R. 431; s. c. 2 Ben. 349; s. c. 1 L. T. B. 56; in re *Phillip A. Doyle*, 3 B. R. 782; in re *Wm. H. Long*, 3 B. R. (quarto) 66; *Preston v. Speer*, 29 Penn. 478; *City Bank v. Banks*, 1 La. An. 418; in re *Daniel J. Perley*, 4 N. Y. Leg. Obs. 254.

The mere omission of property from the schedule is not sufficient evidence of a willful concealment of it. *Steene v. Aylesworth*, 18 Conn. 244.

If the bankrupt honestly regards a judgment as worthless, he may omit it from his schedule without being chargeable with false swearing and fraud. In re *Zenas G. Winsor*, 9 C. L. N. 402.

If the bankrupt, prior to becoming a trader, kept books of account which exhibited the state of his affairs, it is not necessary that he shall carry any part of their contents into the books opened and kept by him while he was a trader. *Ibid.*

To keep proper books of account is to keep an intelligent record of his business affairs with that reasonable degree of accuracy and care which is to be expected from an intelligent man in that business. *Ibid.*

If the bankrupt kept an intelligent record of his affairs, and evinced reasonable care and an honest purpose to fully enter or keep proper accounts, an omission to make an entry by mistake is no ground for withholding a discharge. *Ibid.*

An omission to enter a chattel mortgage given to indemnify the mortgagee against future liability is no ground for withholding a discharge. *Ibid.*

An omission to place property upon the schedule, because the bankrupt concludes in good faith that it does not pass to the assignee, is not a willful concealment of it, where the law by which it may be deemed to vest in him is doubtful and uncertain. *Rugely v. Robinson*, 19 Ala. 404.

The circumstances to establish concealment must depend more or less on the circumstances of every particular case. *Petty v. Walker*, 10 Ala. 379; *Hargroves v. Cloud*, 8 Ala. 173.

The magnitude of a note is evidence of an intentional concealment. *Cutter v. Taylor*, 1 Sandf. 593.

Proof that the debts owing to the bankrupt, and included in his schedules, were against insolvent and irresponsible persons is admissible, for the value of his assets has a material bearing on the question whether he has honestly surrendered all his property. *Cook v. Moore*, 65 Mass. 213.

Whenever the intent of a party forms a part of the matter in issue upon the pleadings, evidence may be given of other acts not in issue, provided they tend to establish the intent of the party in doing the acts in question. *Ibid.*

Where the specification refers to the property alleged to have been concealed as described in a certain deed duly recorded, a copy from the records is not admissible without an attempt to produce or account for the original deed. *Petty v. Walker*, 10 Ala. 379.

The disclosure made by the bankrupt to his counsel who assisted and advised him in making up his inventory, and the advice of his counsel thereon, are admissible under a specification alleging a concealment of property. *Robinson v. Wadsworth*, 49 Mass. 67; *Suydam v. Walker*, 16 Ohio, 122.

It is not enough to show that the bankrupt may have made moneys which he has not accounted for. To prevent the granting of the discharge, the opposing creditor must prove that the bankrupt has willfully sworn falsely. *In re Hummitsh*, 2 B. R. 12; s. c. 15 Pitts. L. J. 494; *in re Pomeroy*, 2 B. R. 14; *in re Sidle*, 2 B. R. 220.

Mere proof of the ownership of property prior to the commencement of the proceedings in bankruptcy, does not devolve on the bankrupt the burden of showing that he was not the owner at that time. *Powell v. Knox*, 16 Ala. 364.

Testimony that a man possessed a capital at one time in property or money, is evidence conducive to show that he held it or some representative in value at any subsequent time, and if the two periods are brought into close proximity, and no known change of his affairs occurs, the evidence will raise a presumption next to positive proof that he continued to possess such means. As the periods compared recede in point of time the force of the presumption weakens. *In re John Bailey*, 1 N. Y. Leg. Obs. 18; s. c. 5 Law Rep. 320.

Proof of ownership of property prior to the commencement of the proceedings in bankruptcy, and of possession after that time, raises a presumption of ownership at that time, and makes it the duty of the bankrupt to show what disposition had been made of it. *Powell v. Knox*, 16 Ala. 364; *Selby v. Gibson*, 3 La. An. 209.

Whenever the possession of property is not referred to the time of the commencement of the proceedings in bankruptcy, or so recently afterward that no business or industry could reasonably have created a fund by

which the property might have been obtained, it rests on the creditor to create the presumption of fraud, by showing that the business or industry of the bankrupt could not reasonably furnish the means to acquire the property held by him as owner. *Petty v. Walker*, 10 Ala. 379; *Powell v. Knox*, 16 Ala. 364.

The possession of property by the bankrupt immediately after the commencement of the proceedings in bankruptcy, which by industry he might reasonably have acquired, will not warrant the presumption that he did not make a full surrender of his estate. But where the value of it is so great as to make it improbable that it was earned by him since that time, it devolves upon him to show how he became the proprietor of such property, whether by inheritance, bequest or purchase. The burden of proof is thrown on him who is best acquainted with the origin and nature of his title. *Hargroves v. Cloud*, 8 Ala. 173; *Ashley v. Robinson*, 29 Ala. 112; *Gilbert v. Bradford*, 15 Ala. 769.

After the bankrupt has proved that he was engaged in a certain business during a certain period, he can not prove what another wholly disconnected from him may have lost while engaged in a similar business. *Edgar v. McArn*, 22 Ala. 796.

To rebut a presumption of the possession of funds, the bankrupt may prove that all the persons engaged in a similar business at a certain place, during a certain period, failed. *Ibid.*

**Custody of Property after Filing Petition.**—(d) Under the bankruptcy act, the bankrupt, before the appointment of an assignee, is the custodian of the estate, and must act, if at all, in the interest of the creditors. *March v. Heaton*, 2 B. R. 180; s. c. *Lowell*, 278; in re *Enoch Steadman*, 8 B. R. 819.

This clause authorizes the bankrupt to file a petition in his own name for an injunction against execution creditors. *Jones v. Leach*, 1 B. R. 595; in re *Schnepf*, 1 B. R. 190; s. c. 2 Ben. 72; in re *Wallace*, 2 B. R. 134; s. c. 1 *Deady*, 433.

A specification alleging that the bankrupt permitted the destruction of certain property should state the time of such destruction, the amount destroyed, and aver that the bankrupt was in charge of the property at the time of its loss, or responsible for it. In re *Eldom*, 3 B. R. 106.

A specification that the bankrupt, prior to the commencement of proceedings in bankruptcy, caused and permitted loss, waste, and destruction of his estate and effects, and misspent and misused the same, can not be sustained. There is no such objection to a discharge to be found in the bankruptcy act, unless the loss, etc., occurred after the filing of the petition. Every kind of fraud is carefully prohibited, but not extravagance or waste, except gaming. In re *W. M. Rogers*, 3 B. R. 564; s. c. *Lowell*, 423; in re *Rosenfield*, 2 B. R. 117; s. c. 1 L. T. B. 100; s. c. 8 A. L. Reg. 44.

The neglect of the debtor to turn over certain books of account to the assignee is no ground for withholding the discharge, when they are useless, and the omission was without fraud on the part of the bankrupt. In re *Wm. H. Pierson*, 10 B. R. 107.

A bankrupt has the right to employ counsel for the purpose of preparing the petition and schedules, and to raise the money to pay him a reasonable compensation therefor, and such compensation is valid. *In re James Thompson*, 13 B. R. 300.

The collection of moneys after the commencement of proceedings in bankruptcy and applying them to his own use, is a ground for withholding a discharge. *In re Michael Finn*, 8 B. R. 525.

The bankrupt must account to the assignee fairly for any money, etc., on hand, and credits outstanding at the commencement of the proceedings in bankruptcy, and for all subsequent profits. *In re Wm. H. Long*, 3 B. R. 66.

A bankrupt who fails to pay over to the assignee the money mentioned in his schedules as on hand at the time of the commencement of proceedings in bankruptcy, may, after being cited before court, under an order to show cause, be committed for contempt. *In re Dresser*, 3 B. R. 557.

**Attachment.**—(e) When the property of the bankrupt has been attached without his knowledge or consent by a hostile creditor, the omission to dissolve an attachment by an application in bankruptcy can not by retrospective effect supply the intent to give a fraudulent preference, which is essential in order to prevent the bankrupt from obtaining a discharge. *In re Francis C. Belden*, 2 B. R. 42; s. c. 2 A. L. Rev. 771; s. c. 15 Pitts. L. J. 547.

**Limitation.**—(f) The limitation as to time annexed to the sixth item was intended to apply to all the intervening items between that and the fourteenth, or these intervening items having no limitation as to time annexed to them must be construed with reference to the principle applicable to law generally, which is that they take effect from the time of their passage. *In re Rosenfield*, 1 B. R. 575; 2 B. R. 117; s. c. 1 L. T. B. 81, 100; s. c. 8 A. L. Reg. 44; *in re Hussmann*, 2 B. R. 437; s. c. 2 L. T. B. 53; s. c. 1 C. L. N. 177; *in re Schofield*, 3 B. R. 551; *in re Hollensshade*, 2 B. R. 651; s. c. 2 Bond. 210; *in re J. H. C. Lutgens*, 7 Pac. L. R. 89. *Contra*, *in re Burk*, 3 B. R. 296; s. c. 1 Deady, 425; s. c. 2 L. T. B. 45.

In regard to the first four of the clauses of this section, relating to the grounds for withholding a discharge, it may be conceded that the character of the acts therein described requires that they should have been committed after the passage of the bankruptcy act. In the fifth clause there is an express limitation of time, which only requires that the act therein described should have been committed within four months before the commencement of proceedings in bankruptcy, and as a petition could have been filed at the end of three months after the passage of the act, it can hardly be said that the act referred to in this clause must have been committed after the passage of the bankruptcy act, in order to bring the bankrupt within the prohibition of the section. The next clause by its express terms is limited to acts committed since the passage of the statute, and as the succeeding clauses—the seventh and the eighth—are only connected with it by the disjunctive “or,” the same may be said in regard to those clauses. The actual and distinct expression of a lim-

itation to acts committed after the passing of the statute, would seem to evidence an intention on the part of the legislature, that the clauses in which there is no such limitation, either expressed or necessarily to be inferred, should not be so limited. In the next or ninth clause there is a change of phraseology, which was not necessary unless it was intended to disconnect its provisions from the limitations of time contained in the three next preceding clauses. If not so intended, the connection with the sixth, seventh, and eighth clauses would have been made by the use of the word "or," alone, as in the seventh and eighth clauses; but the words "if he" are inserted apparently *ex industria* to so far disconnect this clause from those immediately preceding, so as to remove it from the limitation of time expressed in the sixth clause. The subsequent insertion in the thirteenth clause of the words "subsequently to the passage of this act," is also a significant indication that the legislature intended no such or similar limitations to the clauses where no limitation was expressed, or necessarily to be implied from the nature or character of the acts described, and in the fourteenth and sixteenth clauses the words "if he" are inserted as indicating a partial but distinct separation of these clauses from the preceding ones, so as to disconnect them from any limitation of time contained in the preceding clauses. In *re Cretiew*, 5 B. R. 423; s. c. 2 L. T. B. 137.

**Mutilation of Books.**—(g) A specification alleging that the bankrupt has destroyed, mutilated and falsified his documents, papers and writings, is defective, unless it avers that the act was done with intent to defraud his creditors. In *re William H. Marston*, 5 Ben. 313.

The mutilation of the books by third persons after the termination of the business does not bar a discharge. In *re Wm. H. Pierson*, 10 B. R. 107.

**Removal Beyond the District.**—(h) A charge that the bankrupt, in contemplation of bankruptcy, and with intent to defraud the assignee, consigned certain goods to a party out of the district is good in substance—the bankrupt having waived objections of mere form; and if this removal was made with a view, at the time, of becoming bankrupt, and with intent to keep the property from the assignee, it is, in substance, a sufficient charge that the removal was to defraud creditors. But as all this is alleged, though the contemplation of bankruptcy was not necessary, it must be proved. In *re Hammond & Coolidge*, 3 B. R. 273; s. c. Lowell, 381.

**Fraudulent Preferences.**—(i) By the term "fraudulent preference" is meant a preference contrary to the provisions of this act. In *re Rosenfield*, 1 B. R. 575; s. c. 2 B. R. 117; s. c. 1 L. T. B. 81, 100; s. c. 8 A. L. Reg. 44.

A preference is an advantage or benefit which others do not enjoy. In *re Aspinwall*, 3 Penn. L. J. 212.

It is not necessary to allege that the persons to whom the payments were made were creditors of the bankrupt. The ordinary and obvious construction of the allegation is, that the preferences, or payments, or transfers, were made to the persons named as creditors, real or supposed, of

the bankrupt, or as persons to whom he was or might become liable. *In re Smith & Bickford*, 5 B. R. 20.

The fair and reasonable construction of this section is, that it refuses a discharge on the ground of preference only when the act is brought within the definition of section 5110, or of section 5128 itself. Under the latter, it must be proved that bankruptcy was in contemplation, and, under the former, that the creditor was a party to the fraud. *In re Locke*, 2 B. R. 382; *s. c. Lowell*, 293; *in re Burgess*, 3 B. R. 196; *in re Freeman*, 4 B. R. 64; *s. c. 4 Ben.* 245; *in re S. P. Warner*, 5 B. R. 414; *in re John B. Harper*, 6 C. L. N. 279.

In order to deprive a party of his discharge, the transfer or conveyance constituting the preference must be made by him in contemplation of bankruptcy or insolvency, or when he is in fact insolvent, and, in the latter case, the court must not only be satisfied that he was insolvent, but further, that he either had actual knowledge of his insolvency, or had good grounds for fearing and believing that he was insolvent, and acted on such belief in making the preference. In short, he must have designedly and intentionally given a preference, meaning to secure or pay that particular creditor, when he was not able to pay all his debts in the usual and ordinary course of business, at the time fearing and believing such to be the condition of his affairs. It is not necessary that the creditor receiving payment or security should, at the time, know of the insolvency, in order to defeat the discharge by the preference given to him. This fact can in no way affect the condition of the bankrupt himself. He must be held responsible for his own actions, and abide the consequences of his own fraudulent purposes and designs, and should not be permitted to derive any benefit from the fact that, in accomplishing his fraudulent purpose, he was shrewd enough to conceal from the other party his insolvent condition. *In re Gay*, 2 B. R. 358; *s. c. 1 L. T. B.* 73; *in re Adolph Lewis et al.*, 2 B. R. 449; *s. c. 3 Ben.* 153; *s. c. 2 L. T. B.* 75; *in re Benjamin N. Foster*, 2 B. R. 232; *s. c. 1 L. T. B.* 127; *in re Rosenfield*, 2 B. R. 117; *s. c. 1 L. T. B.* 100; *s. c. 8 A. L. Reg.* 44; *in re L. J. Doyle*, 3 B. R. 640; *s. c. 1 Holmes*, 61; *Everett v. Stone*, 3 Story, 446.

It may be that the courts can fairly give a slightly different construction to the phrase "fraudulent preference" from that which obtains under the other section relating to the avoidance of the payment or security. *In re Perry & Allen*, 20 Pitts. L. J. 184; *s. c. 7 W. J.* 379.

No preference can be fraudulent, under the act, unless it is made within four months before the filing of the petition in bankruptcy. *In re John B. Harper*, 6 C. L. N. 279; *in re Wm. H. Pierson*, 10 B. R. 107.

An allegation of a preference should describe the property transferred either as to kind or quantity, and state to whom it was transferred. *Brereton v. Hull*, 1 Denio, 75.

An allegation that the bankrupt made payments or agreements, conveyances or transfers of property with intent to prefer, is bad, because it is in the alternative. *Ibid.*

Where a preference has been fully condoned, so far as the preferred creditor is concerned, by a surrender, and the general creditors have been

restored to the position they would have occupied if there had been no preference, the law does not intend the preference to be regarded as still subsisting against the bankrupt. The general creditors are not technically estopped, because they have no choice but to accept the surrender; but they will receive a dividend out of the very property, in accordance with the policy of the law, which condones the fault of the preferred creditor in consideration of his voluntary action; and the law does not intend to give him, who is usually the active party to the technical fraud, and the only one benefited by it, all the advantages of the repentance, and withhold them from the other party. The policy of the law appears to be to hold out a motive for the prompt settlement of all cases of this kind in favor of the general creditors, by forgiving mere preferences when voluntarily abandoned, even after bankruptcy. In this forgiveness the bankrupt may share, and he may lawfully reply to the specification that there was no preference, but only an attempted preference, abandoned before it was too late. In *re Connor & Hart*, Lowell, 532. Contra, in *re Michael Finn*, 8 B. R. 525.

The English law has two conclusive presumptions. One is, that a trader who conveys his whole property to a pre-existing creditor must have contemplated a preference of that creditor; and the other is, that a debtor who pays an honest debt, with a part only of his assets, does not commit a technical fraud which will render the payment void, if the act was done in consequence of threats or demands on the part of the creditor. The bankruptcy act adopts neither of these presumptions as conclusive. It defines a preference in the statute itself, or rather it has language which is inconsistent with the English definition. It makes the intent to prefer or give an advantage to one creditor the important thing, and this may evidently concur with pressure on the part of a creditor. A payment does not lose its character of preference by being made under pressure. Nor, on the other hand, will the fact that the conveyance was of all the property necessarily and in all cases show a preference. It is a very important circumstance, and almost decisive. But the presumption is still one of fact, and the question, in every case, is whether a preference was intended. It would be very difficult to explain so suspicious a fact. In *re Batchelder*, 3 B. R. 150; s. c. Lowell, 373; in *re Connor & Hart*, Lowell, 532; in *re Ephraim Chase*, 22 Vt. 649.

The payment of a debt through inadvertence, or under a mistaken sense of duty, and without any fraudulent intent, will not deprive a bankrupt of his discharge. In *re Rosenfield*, 2 B. R. 117; s. c. 1 L. T. B. 100; s. c. 8 A. L. Reg. 44; in *re Locke*, 2 B. R. 382; s. c. Lowell, 293; in *re Sidle*, 2 B. R. 220; in *re Burgess*, 3 B. R. 196.

It is not sufficient to show that the bankrupt acted under legal advice in giving a preference, unless it is made to appear that he did so in good faith, believing that he had a legal right to do what he did. In *re Michael Finn*, 8 B. R. 525.

The mere making of payments in the course of his business, with the bona fide, though mistaken, expectation that he can keep along without going into bankruptcy, there being no actual design to favor or prefer,

will not deprive a party of his discharge, although he was insolvent when the payments were so made. In *re Brent*, 8 B. R. 444; s. c. 2 Dillon, 129; in *re Geo. M. Garwood*, Crabbe, 516; in *re Alonzo Pearce*, 21 Vt. 611.

A preference made by an alien, when he was a resident of a foreign country, is a ground for opposing the discharge, for he must show that he has complied with the conditions imposed by law, although he was not aware of them, or was not subject to the law when he did the act. In coming here for the benefits of a discharge from his debts, he adopts the law, and must take it as he finds it. There is no distinction between citizens and aliens in this respect. A citizen who owns property and carries on business in other countries can not do acts which are perfectly lawful there and still obtain the benefits of the statute if the acts are such as will be a bar to the discharge. In *re Goodfellow*, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69.

The application of money on deposit with a bank to pay a note held by it, is a preference, especially when the payment is made before the note becomes due. In *re S. P. Warner*, 5 B. R. 414.

An order by an insolvent debtor upon his consignee to pay a certain sum to a creditor, bars a discharge, although the transfer was inoperative through the omission of the consignee to carry it into effect. In *re George M. Garwood*, Crabbe, 516.

The mere giving of a consent to a sale under a valid attachment is not a preference where the creditor only got what he would ultimately obtain in due course of law. In *re Timothy Reed*, 21 Vt. 635.

Suffering a judgment to be taken by default in an attachment suit after the commencement of the proceedings in bankruptcy, and making no objection to an assessment of the damages where the silent partner, who is a joint defendant, consents, is not a preference, for the security was gained by the attachment and not the judgment. In *re Christopher C. Rowell*, 21 Vt. 620.

An assignment exacting releases as a condition of receiving a dividend is a ground for refusing a discharge, because it is a preference. In *re Aspinwall*, 3 Penn. L. J. 212. Contra, in *re Charles W. Holmes*, 1 N. Y. Leg. Obs. 211.

A mere preference given without contemplation of the proceedings in bankruptcy and more than six months before the filing of the petition, is no ground for withholding a discharge. In *re Oliver L. Jones*, 13 B. R. 286.

**Fraudulent Transfers.**—(j) Quære. Does a specification which not only avers a fraudulent assignment, made in 1861, with the intent to enable the assignor to retain the control and disposition of a large amount of property pretended to be assigned, but goes further, and avers that this property has ever since been in the charge and custody, or under the control of the assignor; that no dividend or other distribution of this property has ever been made to the creditors under the assignment; that a partner now has in his hands, or under his control, a large amount of property and assets pretended to have been included in the assignment;



and that this disposition, detention and custody of the property is with the knowledge, consent, and connivance of the bankrupt—set forth a state of facts which, if proved, would constitute a fraudulent transfer within the meaning of this clause? In re C. W. Moore, 2 Ben. 325; in re Cretlew, 5 B. R. 423; s. c. 2 L. T. B. 137.

An allegation that the bankrupt had made a fraudulent conveyance of his property, without stating the person to whom the conveyance was made or the property conveyed, is insufficient. *Stewart v. Hargrove*, 23 Ala. 429.

A fraudulent conveyance made prior to the passage of the bankruptcy law is ground for withholding a discharge. In re Cretlew, 5 B. R. 423; s. c. 2 L. T. B. 137; *Peterson v. Speer*, 29 Penn. 478. Contra, in re Keefer, 4 B. R. 389; s. c. 3 C. L. N. 125; in re Charles P. Houghton, 4 Law Rep. 482; in re Charles H. Delavan, 5 Law Rep. 370; *Gove v. Lawrence*, 26 N. H. 484; *Porter v. Douglass*, 27 Miss. 379.

A relative may purchase the property of the debtor at a public sale under an execution or mortgage, if he does not do so with the funds of the latter. The relationship merely serves to help out or give point to proofs of mala fides in the transaction. In re John Bailey, 1 N. Y. Leg. Obs. 18; s. c. 5 Law Rep. 320.

When the least degree of concert or collusion is shown between the bankrupt and an alleged fraudulent grantee, the acts and declarations of the grantee may be given in evidence to affect the bankrupt. *Peterson v. Speer*, 29 Penn. 478.

If the bankrupt, shortly before the filing of the petition in bankruptcy, gave his wife a considerable sum of money to meet the family expenses, this was fraudulent. The amount allowed by law as exempt from the operation of the bankruptcy law, is all the bankrupt had the right to retain. The money given to his wife belonged to his creditors, and should have been entered on his schedule of property and assets. In re Jorey & Son, 2 B. R. 668; s. c. 2 Bond, 336.

Spending large sums of money in making permanent improvements upon property belonging to his wife, with intent to delay, hinder and defraud his creditors, is not a fraud of such a character as will bar a discharge. In re John B. Harper, 6 C. L. N. 279.

The fraudulent payment, gift, transfer, conveyance and assignment must be such as are denominated frauds by the terms of the bankruptcy law, and particularly described in sections 5128 and 5129. *Ibid.*

A fraudulent conveyance made at a time so recent that it will affect any of the creditors who can come in under the bankruptcy, is a ground for withholding a discharge. In re Oliver L. Jones, 13 B. R. 286.

**Gaming.**—(k) Property acquired in gaming is assets, and, if the bankrupt spend it in gaming, he loses his right to a discharge. It is impossible to look into the mode in which such property as the statute speaks of has been acquired. If property once in the possession of the bankrupt has been spent in gaming, which, if not so spent, might be assets in bankruptcy, the case is made out. It is too late, after it is spent, to say that it was unlawfully acquired, or acquired in a particular way, or

that creditors are no worse off on the whole. Such losses can not be distinguished from those which any other debtor might sustain in a similar way. Neither the knowledge of the creditors of the course of business of the debtor, nor any intent on his or their part, is material. The fact can only be inquired into. Nor does the law in the matter of discharge invest the court with discretion, as it does so largely in England. It is a mere question of legal right. In *re Marshall*, 4 B. R. 106; s. c. *Lowell*, 462.

**Fictitious Debts.**—(1) Setting forth a false and fictitious debt in the schedule, is an admission of it against the estate that will bar a discharge, but the burden of proof is on the creditors to show that the debt is false and fictitious. In *re Orcutt*, 4 B. R. 538; s. c. 5 *Ben.* 19.

The language of the statute does not embrace a claim admitted to be just in its origin, but against which the bankrupt insists upon rights of set-off, or asserts that it has been satisfied. The distinction is between fabricating a debt where none exists in fact, and stating a debt unquestionably outstanding with the claim of defense to it. In *re Mark Banks*, 1 N. Y. Leg. Obs. 274.

A judgment confessed by the bankrupt without any valuable consideration, however fraudulent it may be as to creditors, is binding on him, and he may put the holder of the judgment on the list of his creditors. In *re David H. Robertson*, 11 N. Y. Leg. Obs. 20.

In order to bar the discharge the debt must be falsely admitted in proceedings under the act. Merely giving a preference to a fictitious debt in an assignment, is not sufficient. In *re Chas. H. Delavan*, 5 *Law Rep.* 370.

The placing of a fictitious debt upon the schedules as just and owing is admitting the debt against the estate within the mischief and meaning of the statute. *Ibid.*

**Books of Account.**—(m) The word "after" means at any time since the passage of the act, though the neglect may not cover the whole period. In *re Rosentfield*, 1 B. R. 575; s. c. 1 *L. T. B.* 81.

If the objection is that certain entries are wanting, or that there are irregularities in the mode of keeping proper books, they ought to be pointed out in the specifications; but where objection is that a cash account is wholly wanting, a general specification is sufficient. In *re Littlefield*, 3 B. R. 57; s. c. *Lowell*, 331; s. c. 1 *L. T. B.* 164; in *re Hammond & Coolidge*, 3 B. R. 273; s. c. *Lowell*, 381.

A specification averring that the bankrupt has not kept proper books of account in his business, in that such books do not show what moneys were received, or what disposition was made of the same, is sufficiently specific to admit evidence that no cash-book whatever was kept for a period of time. In *re Belis & Milligan*, 3 B. R. 496; s. c. 4 *Ben.* 53; in *re Bound*, 4 B. R. 510.

The law intends that a merchant's or trader's books and documents should be in such a condition as to show his business situation to his creditors as well as to himself. By keeping such books in a proper manner, a debtor can not but be aware of his standing, his property and

effects, and his liabilities. On the other hand, his books should exhibit to his creditors his position, so that, when placed before them for investigation, they may at once ascertain his standing and property and the result of his business, and whether everything has been fair and honest on his part. In *re Gay*, 2 B. R. 358; s. c. 1 L. T. B. 73; in *re Newman*, 2 B. R. 302; s. c. 3 Ben. 20; in *re Solomon*, 2 B. R. 285; s. c. 6 Phila. 481; in *re Keach*, 3 B. R. 13; s. c. Lowell, 335; s. c. 1 L. T. B. 167; in *re William Archenbraun*, 12 B. R. 17; s. c. 7 C. L. N. 231.

The word "tradesman" has substantially the same meaning as shop-keeper. In *re Cote*, 14 B. R. 503.

As the section is almost penal, the term "tradesman" should be confined to those who belong to that class with some degree of permanence. *Ibid.*

Persons who buy and sell in a small way merely by way of eking out their living, which is earned substantially in other ways, are not tradesmen. *Ibid.*

Manufacturers of and dealers in shoes are tradesmen. In *re Jorey & Son*, 2 B. R. 668; s. c. 2 Bond, 336.

A party whose only business is that of speculating in stocks is not a merchant or tradesman, if he keeps no office and buys and sells through brokers. In *re William H. Marston*, 5 Ben. 313.

A stairbuilder is a merchant or tradesman. He is none the less a tradesman because he is also a manufacturer of the stairs, or because he does not resell the lumber and other materials in the same state in which he buys them, or because he does not buy and sell completed stairs. In *re Edward Garrison*, 7 B. R. 287; s. c. 5 Ben. 430.

A person buying and selling goods for the purpose of gain, though only occasionally, is a merchant and trader. In *re O'Bannon*, 2 B. R. 15.

The distinction taken in England, whether every one who buys and sells goods is quoad hoc a tradesman, may admit of question. And yet it is very difficult to draw any line founded solely on the smallness of the transactions. It would seem that any one who buys on credit with intent to sell again at a profit, and who has no other regular business, is fairly within the mischief of the act. Though, where the buying and selling are a mere incident, as, if a farmer should buy stock or grain in addition to what he had raised, perhaps such a person could not be described as a tradesman. In *re Tyler*, 4 B. R. 104.

A person who bought goods which he could use, and did use, and which he sold when pressed for money, can not be deemed a trader. Isolated and separate acts, having no connection with each other, and showing no intention to set up any trade, do not make a person a tradesman. The deliberate purpose of buying goods to sell them again might be within the letter of the act. So might an amount of trading, however small, connected with an intent to deal generally. In *re W. M. Rogers*, 3 B. R. 564; s. c. Lowell, 423.

A person whose occupation is that of a baker, and who buys flour which he converts into bread, and then sells the bread to daily customers, is a tradesman. In *re Cocks*, 3 Ben. 260.

If a firm has not kept proper books of account, a partner can not obtain a discharge, although he was a junior member and not a keeper of the books. *In re Wm. H. Pierson*, 10 B. R. 107.

When the business has been wholly closed, so that no rights or interests can be subject to examination or decision in the bankruptcy court, and there is nothing left outstanding in the way of assets or of debtors or of creditors, and the business was one which neither required nor received the use of any capital, so that there is nothing in it which can concern the assignee, or which the books could show him to his advantage, such past trading can not be considered as within the equity of letter of the statute, and in those transactions the bankrupt is not a merchant or tradesman within the fair construction of the bankruptcy act. The books are not the only proper evidence that the business is thus wholly closed and past. This may be proved aliunde. The schedules, proofs of debt, and all the proceedings in the case, may be admitted for that purpose, together with oral testimony. *In re Keach*, 3 B. R. 13; s. c. *Lowell*, 335; s. c. 1 L. T. B. 167.

The final winding up of a trader's business should be recorded, as well as its current course, and, unless the bankrupt can clearly show that everything has been so fully ended that no such account could affect his standing, or touch the interests of his creditors at the time of his bankruptcy, the omission to keep proper books, which, at the time of his trading, was an illegal act, will be an effectual bar to his discharge. *In re Tyler*, 4 B. R. 104.

If there was no continued trading, the bankrupt was not required to keep regular books. *In re Mark Banks*, 1 N. Y. Leg. Obs. 274.

The creditor must take the burden of proof and show that the bankrupt did not keep proper books of account. *Ibid*.

This is a most important provision, because it is that which is intended to provide the assignee representing the creditors with the means of tracing out all the dealings of the debtor, to ascertain what has become of his property, what are the causes of his failure, and whether he has dealt fairly and equally with his creditors. However harshly the law may sometimes operate with some small traders, whose affairs seem hardly worthy of the trouble of recording them, it is a most reasonable and salutary rule in its application to merchants dealing with large sums and contracting large debts, and in a position to know and to be able to carry out the law. *In re George & Proctor*, *Lowell*, 409.

The intent of the nonkeeping of books is of no importance. The mere omission is the thing plainly interdicted. Such omission prevents a discharge, whether the intent was fraudulent or not. *In re Solomon*, 2 B. R. 285; s. c. 6 Phila. 481; *in re Newman*, 2 B. R. 302; s. c. 3 Ben. 20; *in re Jorey & Son*, 2 B. R. 668; s. c. 2 Bond. 336; *in re Schumpert*, 8 B. R. 415; *in re William Archenbraun*, 2 B. R. 17; s. c. 7 C. L. N. 231.

No excuse, however true, and no innocence of intention, will avail to supply the deficiency. *In re George & Proctor*, *Lowell*, 409.

Whether the books of account are properly kept is a question which must be decided in every case upon the facts as they appear, and not upon

any strict rule that such and such books and such and such entries are essential in all cases. In *re Perry & Allen*, 20 Pitts. L. J. 184; s. c. 7 W. J. 379.

It is not necessary that these books be kept according to the forms taught in schools, or in ledgers and day-books bound in leather. In business of some kinds, any contemporaneous written memorials, formal or informal, of a tradesman's transactions, whether in a bound volume or in detached sheets, may answer the definition of proper books of account, if they have been preserved and so arranged as to present an intelligible and substantially complete exposition of his affairs. The question of what are proper books must be in each case a question of evidence. What would be proper and sufficient books in one case would be improper and insufficient in another. In *re Solomon*, 2 B. R. 285; s. c. 6 Phila. 481; in *re Newman*, 2 B. R. 302; s. c. 3 Ben. 20; in *re Wm. F. White*, 2 B. R. 590; s. c. 2 L. T. B. 105; s. c. 16 Pitts. L. J. 110; in *re Batchelder*, 3 B. R. 150; s. c. Lowell, 373.

It is not sufficient that the bankrupt employed a bookkeeper whom he considered competent, and left the whole charge of the books to him. The law does not require traders to keep a bookkeeper, but to keep books, and they are responsible to see that this is done. In *re Hammond & Coolidge*, 3 B. R. 273; s. c. Lowell, 381.

Entries upon numerous slips of paper, each entry being on a separate slip, is not a keeping of books under the law. This may do for a short time in the absence of the books, but not as a system or policy of a permanent character. If the books were lost, and there was no reasonable expectation of finding them, or if they were not found within a reasonable time, it was the duty of the bankrupt to supply their place with others. *Ibid.*

A retail dealer who keeps the usual books and all his invoices keeps proper books of account, although he kept no invoice book. In *re J. K. P. Reed*, 12 B. R. 390.

There is no positive rule of law requiring the entries to be made daily (though they ought to be at or near the time of the transactions), or the balances to be made at any fixed periods, or the books to be kept in any particular mode. In *re George & Proctor*, Lowell, 409.

The law requires that a merchant or tradesman should keep such books as, considering the nature and circumstances of his trade, are necessary to exhibit to a person of competent skill the true state of his dealings and affairs. In *re Hammond & Coolidge*, 3 B. R. 273; s. c. Lowell, 381; in *re Solomon*, 2 B. R. 285; s. c. 6 Phila. 481; in *re Jorey & Son*, 2 B. R. 668; s. c. 2 Bond, 336; in *re Mark Banks*, 1 N. Y. Leg. Obs. 274.

It is a question of fact whether the books are such as will give to a competent person examining them knowledge of the true state of the bankrupt's affairs. The question is addressed to the good sense and knowledge of the jury, aided by such explanations as may be offered by experts or other competent witnesses. In *re George & Proctor*, Lowell, 409; in *re Hammond & Coolidge*, 3 B. R. 273; s. c. Lowell, 381; in *re Schumpert*, 8 B. R. 415; in *re J. K. P. Reed*, 12 B. R. 390.

Where the day-book and the ledger taken together show all the transactions of the bankrupt, a discharge may be granted, although there are some meaningless mutilations in each. *In re Wm. H. Pierson*, 10 B. R. 107.

A cash account is necessary to an understanding of a trader's business, and when one has not been kept a discharge will be refused. *In re Gay*, 2 B. R. 358; s. c. 1 L. T. B. 73; *in re Solomon*, 2 B. R. 285; s. c. 6 Phila. 481; *in re Littlefield*, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164; *in re Bellis & Milligan*, 3 B. R. 496; s. c. 4 Ben. 55.

The cash-book should show, in an intelligible and proper manner, the nature and character of the receipts and disbursements of cash made by the bankrupt. *In re Mackey et al.*, 4 B. R. 66; s. c. 2 C. L. N. 393.

The omission of an entire book or set of entries, necessary to the understanding of the business, prevents a discharge. *In re Wm. F. White*, 2 B. R. 590; s. c. 2 L. T. B. 105; s. c. 16 Pitts. L. J. 110.

Careless omissions or mistakes, without fraud, in books themselves proper, may be overlooked. *In re Wm. F. White*, 2 B. R. 590; s. c. 2 L. T. B. 105; s. c. 16 Pitts. L. J. 110; *in re Burgess*, 3 B. R. 196.

The question is, whether the bankrupt did all that a prudent business man, intending to keep his accounts accurately, would naturally do. A temporary omission, in good faith and for a reasonable time to make the entries, would not be a failure to keep books. But a neglect to keep them on purpose for a reasonable time would be. *In re Hammond & Coolidge*, 3 B. R. 273; s. c. Lowell, 381.

Where one of the books has been mutilated, but all the outstanding accounts which it contained have been transferred to another book, a discharge will be granted when the evidence shows that no fraud was done to the creditors by the change, and that the accounts were all collected, as far as collectible. *In re Noonan & Connolly*, 3 B. R. 267.

Persons who buy on credit, and sell again in such wise as to be merchants or tradesmen, must see to it, in order to be in a position when misfortune overtakes them to obtain the benefits of the bankruptcy act, that they keep such books in relation to their business as will furnish an intelligible account to their creditors of the state and course of their business transactions, not leaving such accounts to be made up from memory, or from sources other than such books. *In re Edward Garrison*, 7 B. R. 287; s. c. 5 Ben. 430.

A discharge will not be refused to a bankrupt for not keeping proper books of account, without full evidence of the facts and of their bearing upon his business. The books themselves should be produced, and the parcel statements should be definite. *In re Batchelder*, 3 B. R. 150; s. c. Lowell, 373.

A canceled check is admissible in evidence in connection with the stump of the check-book, to show how the book was kept. *In re W. E. Brockway*, 7 B. R. 595.

**Assent of Creditor to Discharge.**—(n) A specification which avers that the bankrupt or some person in his behalf has procured the assent of certain creditors to his discharge and influenced their action by a pecuniary

consideration is too vague to be triable. In re Freeman, 4 B. R. 64; s. c. 4 Ben. 245.

The specification should aver that the bankrupt has procured the assent of a creditor to the discharge by a pecuniary consideration or obligation. The bankrupt is not forbidden to procure the assent of a creditor to his discharge, nor is he forbidden to influence the action of a creditor. The prohibition is against procuring such assent or influencing such action by any pecuniary consideration or obligation. In re Mawson, 1 B. R. 437, 548; s. c. 2 Ben. 332, 412; Fox v. Paine, 10 Ala. 523; Coates v. Blush, 55 Mass. 564; Chamberlin v. Griggs, 3 Denio, 9.

If a bankrupt obtains the consent of a creditor to a discharge by giving him his indorsed note for a part of the debt, his discharge will be refused, although he had previously procured the assent of a sufficient number to entitle him to a discharge. In re E. V. Palmer, 14 B. R. 432.

If a claim is purchased by a friend of the bankrupt with no conceivable motive but to benefit the bankrupt, and the assent of the creditor to a discharge is so placed on the paper that it may have influenced others, the presumption is that the purchase was made in behalf of the bankrupt, and the discharge will be refused. In re Whitney et al., 14 B. R. 1; s. c. 8 O. L. N. 195.

**Transfers in Contemplation of Becoming Bankrupt.**—(o) An examination of the act, in connection with the Forms, shows that the expression, "becoming bankrupt," means committing an act of bankruptcy, and that the expression, "in contemplation of becoming bankrupt," means in contemplation of committing an act of bankruptcy. The act of bankruptcy, the commission of which must be contemplated, is such an act as the statute declares to be an act of bankruptcy. A debtor may become bankrupt or commit an act of bankruptcy by filing a petition under section 5014, or by doing some one of the things which is declared by section 5021 to be the commission of an act of bankruptcy. It is not necessary, in order that he should have contemplated becoming bankrupt, that he should have contemplated having a petition filed against him, and being adjudged a bankrupt thereon, provided he contemplated committing an act which is defined by section 5021 to be an act of bankruptcy, or filing a petition under section 5014. In re Goldschmidt, 3 B. R. 165; s. c. 3 Ben. 379; in re Freeman, 4 B. R. 64; s. c. 4 Ben. 245; in re Lawson, 2 B. R. 113; in re Cretlew, 5 B. R. 423; s. c. 2 L. T. B. 137; in re J. H. C. Lutgens, 7 Pac. L. R. 89; in re Wm. H. Pierson, 10 B. R. 107; in re Alonzo Pearce, 21 Vt. 611; in re Christopher C. Rowell, 21 Vt. 620; Swan v. Littlefield, 58 Mass. 574; Caryl v. Russell, 13 N. Y. 194; s. c. 18 Barb. 420; North American Ins. Co. v. Graham, 5 Sandf. 197. Vide in re Chas. W. Holmes, 5 Law Rep. 360.

A debtor may sell property for the purpose of procuring means to defray his expenses in contemplated bankruptcy proceedings, provided he does not sell at a sacrifice, and that the sum so raised is reasonable in amount. In re Keefer, 4 B. R. 389; s. c. 3 C. L. N. 125; Flournoy v. Newton, 8 Ga. 306; Lyon v. Marshall, 11 Barb. 241.

Where an insolvent debtor makes an assignment for the benefit of creditors three days before the filing of his petition in bankruptcy, his denial of

any intention, at the time of making the assignment, to take the benefit of the bankruptcy act, however positive, is not, in the absence of confirmatory circumstances, sufficient to repel the presumption arising from the facts, and a discharge must be refused. A system which would thus, in practice, permit a discharge of the debtor, without a simultaneous administration and distribution of the property among the creditors, would be a monstrosity. *In re Broadhead*, 2 B. R. 278; s. c. 3 Ben. 106.

An assignment for the benefit of creditors by a party in contemplation of becoming bankrupt is good ground for refusing a discharge in a case of voluntary bankruptcy. The fact that the assignment is one of all the debtor's property, and creates no preferences among his creditors, makes no difference. It is as repugnant to the act as if it had assigned only a part of his property, or had created preferences. It shows an intent and a purpose on the part of the bankrupt to assume the distribution of his property in satisfaction of his debts through the agency of an assignee selected by himself. This necessarily involves the existence of a purpose to prevent the same property from being distributed under the bankruptcy act in satisfaction of the same debt. There could be no other purpose. *In re Goldschmidt*, 3 B. R. 165; s. c. 3 Ben. 379. *Contra*, in *re Pierce & Holbrook*, 3 B. R. 258; s. c. 16 Pitts. L. J. 204; in *re John M. Quackenboss*, 1 N. Y. Leg. Obs. 146; *Smith v. Ely*, 10 B. R. 553.

This clause does not include consignments which do not change the title, but are merely the employment of an agent. *In re Hammond & Coolidge*, 3 B. R. 273; s. c. Lowell, 381.

The filing of a bill in equity against a copartner, and procuring the appointment of a receiver is not such a transfer as is contemplated by this section. *In re Robert H. Shoemaker*, 4 Biss. 245.

ACT OF 1898, As to contesting discharge, see *post*, p. 729.

ACT OF 1867, § 5111. Any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in its discretion order any question of fact so presented to be tried at a stated session of the district court.

Statute revised — March 2, 1867, ch. 176, § 31, 14 Stat. 532. Prior Statute — Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.

**Filing Specifications.**—Any person who shows by affidavit or otherwise that he is a creditor, has the right to appear and oppose the discharge, without being in technical strictness a creditor who has proved his debt. To entitle him to oppose the discharge, he must have a pecuniary interest in the matter, and that interest must be satisfactorily shown. *In re L. Sheppard*, 1 B. R. 439; s. c. 1 L. T. B. 49; s. c. 7 A. L. Reg. 484; in *re Smith & Bickford*, 8 Blatch. 461; in *re Murdock*, 3 B. R. 146; s. c. Lowell, 362; s. c. 2 L. T. B. 97; in *re Boutelle*, 2 B. R. 129; s. c. 15 Pitts. L. J. 616; in *re Samuel Book*, 3 McLean. 317. *Contra*, in *re Levy et al.*, 1 B. R. 327; s. c. 2 Ben. 169; in *re W. D. Hill*, 1 B. R. 16; s. c. 1 Ben. 321; in *re Burk*, 3 B. R. 296; s. c. 1 Deady. 425; s. c. 2 L. T. B. 45;



in re O. N. Palmer, 3 B. R. 301; in re Brown King, 1 N. Y. Leg. Obs. 22; s. c. 5 Law Rep. 220.

A judgment obtained after the adjudication in bankruptcy, creates a new debt which can not be proved in bankruptcy, because the judgment is a merger, and creates a new debt, and the judgment creditor can not oppose the discharge, because he has no provable debt, and because the discharge will be no bar to the judgment. A creditor who proved his debts before obtaining judgment, may keep his proof and oppose the discharge if he will file a stipulation to release his judgment in case the final decision in bankruptcy shall grant the bankrupt his discharge. In re Gallison et al., 5 B. R. 353; s. c. 2 L. T. B. 195.

Where the bankrupt has acted as administrator, and the probate court has directed a dividend to be made among the creditors, any creditor of such an estate has an interest in the bankrupt's estate, and may oppose his discharge. In re John C. Tebbetts, 5 Law Rep. 259.

If a creditor who held the bankrupt's bond assigned it as a collateral to secure a debt, and then allowed a judgment to be recovered thereon in his name, has any surplus that would come to him after the payment of the debt, he may oppose the discharge. In re Traphagan, 1 N. Y. Leg. Obs. 98; s. c. 5 Law Rep. 323.

The appointment of a receiver and an assignment of the claim to him does not divest the creditor of his interest in the claim so but that he can oppose the discharge. Ibid.

The specifications may be filed with the register. Form No. 53 contemplates that they may be addressed to him. In re Bellamy, 1 B. R. 98; s. c. 1 Ben. 426.

By section 4999, the register is forbidden to hear any questions as to the allowance of an order of discharge. Such questions are to be determined by the court after the bankrupt has applied for his discharge. If the specifications are filed, the case is then ipso facto removed from before the register and taken into court. In re Mawson, 1 B. R. 265; s. c. 2 Ben. 122; in re Puffer, 2 B. R. 43.

A creditor may file specifications at any time. Rule XXIV is enabling, and not prohibitory. A creditor who does not file specifications by the time specified in Rule XXIV, will lose his opportunity of doing so. But he has the right to file them at any stage of the proceedings before that time. In re Baum, 1 B. R. 5; s. c. 1 Ben. 274.

The orderly conduct of the proceedings requires that the trial of all questions so raised shall be postponed till the hearing of the petition for discharge. The register will proceed with the case, notwithstanding the specifications. In re Puffer, 2 B. R. 43; in re Brisco, 2 B. R. 226; in re W. D. Hill, 1 B. R. 16; s. c. 1 Ben. 321; in re Paget 1 Penn. L. J. 367 in re George Livermore, 5 Law Rep. 370.

The proceedings upon the order to show cause may be adjourned upon the return day thereof. In re Mawson, 1 B. R. 271.

Such an adjournment may be made without requiring the creditors to file an appearance under Rule XXIV. The rights of a creditor upon the adjourned day are the same in all respects as upon the return day. In re

John Thompson, 1 B. R. 323; s. c. 2 Ben. 166; in re Tallman, 1 B. R. 540; s. c. 2 Ben. 404; in re James M. Seabury, 10 B. R. 90; in re S. S. Houghton, 10 B. R. 337.

On the entry of an appearance of a creditor to oppose a discharge, all proceedings upon the petition for a discharge are suspended until specifications shall be filed. On filing the specifications, the hearing upon the petition is at once transferred into court. There can not, therefore, be any examination of the bankrupt on the application for a discharge before the register. The proceeding for an examination must be taken under section 5086. In re Frizelle et al., 5 B. R. 119.

The time to file objections to a discharge may be kept open by adjourning any day which may be fixed for showing cause against a discharge until a full, reasonable opportunity is afforded for the examination of the bankrupt and his wife and other witnesses. In re Seckendorf, 1 B. R. 626; s. c. 2 Ben. 462.

The time for showing cause against the discharge may be extended from time to time upon the application of a creditor, even though a protest has been made against the allowance of his claim, until the examination of the bankrupt and other witnesses is concluded, the whole matter being subject to regulation by the register and the court as to the use of reasonable diligence. In re Belden & Hooker, 4 Ben. 225.

An adjournment sine die terminates the proceedings. The petition for discharge remains good, but nothing can be done under it unless a new order to show cause is issued. In re Seckendorf, 1 B. R. 626; s. c. 2 Ben. 462.

Any abuse by the register of the power to adjourn may be corrected by the district court, which has power to supervise the proceedings. In re W. E. Robinson, 2 B. R. 342; s. c. 36 How. Pr. 176; s. c. 6 Blatch. 253; s. c. 2 L. T. B. 18.

Upon the day appointed to show cause, a creditor intending to oppose the application for a discharge must enter his appearance in opposition thereto. His appearance is entered with the clerk, as provided in Rule III. Until such appearance is entered, the creditor has no standing in court as to the petition for a discharge, and, therefore, can not be heard in opposition thereto. In re Robert A. Sutherland, 1 Deady, 573.

On the day fixed to show cause, the creditor must appear by himself or counsel, and enter his opposition, which should either be in writing or verbally; but an entry of such opposition should be made on the docket, and suspend further proceedings until the filing of the specifications; and if the specifications are not filed within ten days, the cause progresses as though no opposition had been made, unless, for sufficient cause shown, the time for filing is extended. A request to have an appearance entered can not be made until after the petition for discharge is filed. In re McVey, 2 B. R. 257; in re James M. Seabury, 10 B. R. 90.

The appearance is not complete until the clerk enters the name of the attorney and his place of business upon the docket, with the date of entry. In re James M. Seabury, 10 B. R. 90.

An appearance entered after the return day must be disregarded. In re McVey, 2 B. R. 257; in re Smith & Bickford, 5 B. R. 20; Creditors v. Williams, 4 B. R. 580; s. c. 2 L. T. B. 166; in re Robert A. Sutherland, 1 Deady, 573; in re James M. Seabury, 10 B. R. 90; in re Joseph Buxbaum, 13 B. R. 477.

If the creditor did not receive notice of the application for a discharge, he may be allowed to enter an appearance after the return day. In re Chauncey J. Filley, 2 Cent. L. J. 419.

The district court may, in its discretion, allow a creditor to enter his appearance and file specifications in opposition to a discharge, although the time for entering an appearance in opposition thereto has expired. In re Lewis Levin, 14 B. R. 385.

Specifications not filed within the prescribed time can not be entertained. In re McVey, 2 B. R. 257.

A specification not signed by an attorney legally authorized to act for the creditor is a nullity, and must be disregarded. A power of attorney not containing a power of substitution, does not authorize a person other than the party duly constituted agent thereby, to sign his own name or affix the name of such agent to specifications on behalf of a creditor. In re C. N. Palmer, 3 B. R. 301; Creditors v. Williams, 4 B. R. 580; s. c. 2 L. T. B. 166.

When a creditor has regularly entered his appearance on the return day, but has failed, through inadvertence, to file specifications within the prescribed time, the court, on cause shown, will allow him to file them *nunc pro tunc*. In re Grefe, 2 B. R. 329.

The filing of an opposition to a bankrupt's discharge is the commencement of an individual proceeding on the part of the creditor against the bankrupt. It is, in fact, a suit arising in the course of the bankrupt's proceedings. It involves pleadings, costs, and attorney's fees; it may involve a trial by jury. The question of discharge may linger in the court for years, and in every case involves more or less expense and costs. A letter of attorney, according to Form No. 26, does not authorize the attorney to make opposition to the discharge of the bankrupt, and involve him in such a controversy. Creditors v. Williams, 4 B. R. 580; s. c. 2 L. T. B. 166.

The proceeding for a discharge depends on the proceedings in bankruptcy, and is inseparably connected with them. In fact and in law it must be considered as a continuation of the former proceedings. In re Ankrim, 3 McLean, 285.

If the original objector declines to prosecute his specifications, other creditors may be permitted to enter their appearance and be heard in support of the objections, although the time for entering an appearance is past. In re S. S. Houghton, 10 B. R. 337. Contra, in re David A. McDonald, 14 B. R. 477; s. c. 24 Pitts. L. J. 42; s. c. 12 Pac. L. R. 99.

Where there is no opposing party, the petition of the bankrupt for final discharge may be continued from time to time to suit the convenience of the bankrupt. A day is appointed for the creditors to show cause, but such appointment does not fix the day for hearing the application for a discharge. In re Robert A. Sutherland, 1 Deady, 573.

**Averments in Specifications.**—The specification should state the name of the opposing creditor. In *re Robert H. Shoemaker*, 4 Biss. 245.

All grounds against the discharge, except those which appear on the face of the proceedings, must be assigned in writing as specifications, whether they are enumerated in section 5110 or not, if the creditor intends to rely on them. In *re James M. Seabury*, 10 B. R. 90.

The specifications must not be vague and general. The allegations must be allegations of facts, and must be distinct, precise, and specific, and must not be merely allegations in the language of section 5110, or allegations so general as really not to advise the bankrupt what facts he must be prepared to meet and resist. In *re Rathbone*, 1 B. R. 294, 324; s. c. 2 Ben. 138; in *re Beardsley*, 1 B. R. 304; in *re W. D. Hill*, 1 B. R. 275; s. c. 2 Ben. 136; in *re Mawson*, 1 B. R. 437; s. c. 2 Ben. 332; in *re Waggoner*, 1 Ben. 532; in *re Burk*, 3 B. R. 296; s. c. 1 Deady, 425; s. c. 2 L. T. B. 45; in *re Butterfield*, 14 B. R. 147; s. c. 5 Biss. 120.

The strictness of common-law pleading is not required, but the bankrupt is entitled to such particularity of statement as to give him reasonable notice of what is expected to be proved against him. In *re Smith & Bickford*, 5 B. R. 20.

Specifications must particularize facts descriptive of the offense as charged to constitute the ground for objecting to the discharge, setting forth, as clearly as may be, the time, place, person, etc. A specification containing a reference to facts supposed to be shown upon an examination of the bankrupt is, in that respect, faulty. The facts alone should be set forth, without reference to any matter aliunde. In *re Eldom*, 3 B. R. 106.

The specifications may be amended. In *re W. D. Hill*, 1 B. R. 275; s. c. 2 Ben. 136; in *re Rathbone*, 1 B. R. 294; s. c. 2 Ben. 138; in *re Burk*, 3 B. R. 296; s. c. 1 Deady, 425; s. c. 2 L. T. B. 45.

The creditors will not be compelled to abide by the specifications placed on file, when there has not been sufficient examination or disclosure on the part of the bankrupt before the time appointed for a hearing in court upon his application for his discharge. In *re Wm. H. Long*, 3 B. R. (quarto) 66.

The court may, in its discretion, where it appears to be due to justice, allow an amendment of the specifications, even at the trial. In *re Belis & Milligan*, 3 B. R. 496; s. c. 4 Ben. 53.

Vague and general specifications may be stricken out. In *re Waggoner*, 1 Ben. 532.

Vague specifications may be disregarded. In *re Rathbone*, 1 B. R. 294; s. c. 2 Ben. 138; in *re Son*, 1 B. R. 310; s. c. 2 Ben. 153; in *re Tyrell*, 2 B. R. 200; in *re Hanson*, 2 B. R. 211; in *re Dreyer*, 2 B. R. 212.

**Trial of Specifications.**—The bankrupt may question the sufficiency in law of the grounds of opposition to his discharge by a demurrer, or by exceptions analogous to those allowed in equity. In *re Rosenfield*, 2 B. R. 117; 1 L. T. B. 100; s. c. S. A. L. Reg. 44; in *re McVey*, 2 B. R. 257; in *re Burk*, 3 B. R. 296; s. c. 1 Deady, 425; s. c. 2 L. T. B. 45.

The court may direct a trial of the specifications by a jury. When there is a trial, the docket fee of \$20 to the attorney of the successful

party is taxable as part of the costs. The word "trial" means a trial by jury. The pleadings may be filed, the issues made up, but until the jury is sworn there is no trial. *Gordon, McMillan & Co. v. Scott & Allen*, 2 B. R. 86; s. c. 1 L. T. B. 90; s. c. 7 A. L. Reg. 749; in *re Eldom*, 3 B. R. 160.

The opposing creditor can not move to dismiss the petition because the bankrupt is supposed to be dilatory in bringing the matter on for a hearing. The remedy of the creditor is to move the court to set down the matter for hearing upon the petition and his objections thereto. In *re Robert A. Sutherland*, 1 Deady, 573.

On the day assigned for hearing the specifications, the creditors are entitled to a trial by jury, without having previously made a special demand for it. In *re Lawson*, 2 B. R. 113.

The burden of proof is on the creditor to show that the bankrupt has forfeited his title to a discharge by having done some of the things specified in section 5110, as grounds for withholding it. In *re W. D. Hill*, 1 B. R. 275; s. c. 2 Ben. 136; in *re Mawson*, 1 B. R. 548; s. c. 2 Ben. 412; in *re Okell*, 2 B. R. 105; in *re Burgess*, 3 B. R. 196; in *re Noonan & Connolly*, 3 B. R. 267; in *re George & Proctor*, Lowell, 409; *Loud v. Pierce*, 25 Me. 233.

When the creditors have established a *prima facie* case, the burden of overthrowing it is imposed upon the bankrupt. In *re P. A. Doyle*, 3 B. R. 782.

The decision rendered upon the petition for involuntary bankruptcy does not affect the debtor on the question of his discharge. In *re Dibblee et al.*, 2 B. R. 617; s. c. 3 Ben. 283.

The debtor will not be prejudiced in his application for a discharge by allowing judgment to be taken by default on the petition in involuntary bankruptcy. In *re Latrop, Luddington & Co.*, 3 B. R. 46; s. c. 2 L. T. B. 124. *Contra*, in *re Schoo*, 2 B. R. 215.

Evidence in support of the specifications is the only evidence that can be introduced. The creditor is bound by his specifications. He can not go beyond them, or produce evidence outside of them. In *re Rosenfield*, 2 B. R. 117; s. c. 1 L. T. B. 100; s. c. 8 A. L. Reg. 44; *Timothy v. Reed*, 21 Vt. 635.

A creditor who has given his assent to any act on the part of the bankrupt is estopped from urging that act as a ground for withholding the discharge. In *re Schuyler*, 2 B. R. 549; s. c. 3 Ben. 200; s. c. 2 L. T. B. 85; in *re Whetmore*, 1 Deady, 585; s. c. 1 L. T. B. 136; in *re Jones & Hoyt*, 12 B. R. 48; s. c. 7 C. L. N. 162.

A person who was not a creditor at the time of the alleged removal of property, or whose debt was then barred by the statute of limitations, can not object to the discharge on the ground of the removal. Practically, as to him, there was no fraud. In *re Burk*, 3 B. R. 296; s. c. 1 Deady, 425; s. c. 2 L. T. B. 45.

The only grounds on which the charge will be withheld, are those set forth in the specifications. In *re Rosenfield*, 3 B. R. 117; s. c. 1 L. T. B. 100;

s. c. 8 A. L. Reg. 44; in re Schuyler, 2 B. R. 549; s. c. 3 Ben. 200; s. c. 2 L. T. B. 85.

The assertion of a fact by the bankrupt's wife, in his presence and denied by him, can not be given in evidence to impeach the testimony of the bankrupt. In re John Q. McCarty, 5 Law Rep. 322.

An exemplification of the sworn answer of the bankrupt to a bill brought against him in chancery is admissible against him. Anon., 1 N. Y. Leg. Obs. 349; in re Maynard Bragg, 1 N. Y. Leg. Obs. 119; s. c. 5 Law Rep. 323.

Where an original bill filed by the bankrupt is given in evidence, the amended bill is not admissible to rebut or explain admissions made in the original bill. Pearsall v. McCartney, 28 Ala. 110.

When the transfer is shown to be in writing, the written instrument must be produced, although its contents can be proved by the declarations of the bankrupt. Flournoy v. Newton, 8 Ga. 306.

It is not competent for the bankrupt to repel a charge of fraud by evidence of his character. Pearsall v. McCartney, 28 Ala. 110.

The declaration of a party in the possession of real or personal property that he holds in his own right or under another, is proper evidence as a part of the *res gestae*, which *res gestae* is his possession, but such declarations beyond this are no part of the subject-matter or thing done, and can not be received as evidence. Gilbert v. Bradford, 15 Ala. 769.

The opposing creditor holds the affirmative of the issue, and ought to begin. In such a proceeding the objector is the actor, and the bankrupt stands on the defensive. Anon., 3 N. Y. Leg. Obs. 155.

If there was probable cause for filing specifications, each party may be required to pay his own costs. In re Christopher C. Rowell, 21 Vt. 620.

The costs of taking testimony before a register to be used in the trial of the specifications can not be taxed against an unsuccessful creditor. In re Eldon, 3 B. R. 160.

When the bankrupt has, in all things, fully conformed to his duty under the act, the assignee, when he has funds belonging to the estate, should pay the costs incurred upon the petition for a discharge, the publication of notice of hearing, and the hearing of the petition. The case would be different if creditors successfully opposed the granting of a discharge. In re Olds et al., 4 B. R. 146; s. c. 2 L. T. B. 125; in re Dibblee et al., 4 Ben. 304; in re Moses Guild, 1 W. & M. 29.

A discharge granted after trial upon a specification charging the concealment of certain property, is not a bar to a suit by the assignee to recover the same. Jones v. Milbank, 6 Lans. 73.

The district court will not restrain the assignee from prosecuting a suit in a State court, although the allegations are the same in substance as those stated in specifications against a discharge by others than the assignee, and which were then held out to be proved as matter of fact. It is more proper that such questions should be determined in the plenary suit, if raised therein, and by the tribunal in which the suit is brought, with the provisions for review which obtain between party and party. In re Penn et al., 5 B. R. 93; s. c. 5 Ben. 500.

The district court may set aside the verdict of a jury, and order a new trial in consonance with the rules upon which such new trials are granted in courts of law. *In re Barney Corse*, 1 N. Y. Leg. Obs. 231.

The decision of the district court on the specifications is an estoppel to any other action between the same parties involving the same questions. *Downer v. Rowell*, 25 Vt. 336.

The discharge of the bankrupt after opposition by a creditor does not operate as a bar to a recovery by the assignee against a vendee in an action of ejectment for property fraudulently conveyed to him by the bankrupt. *Bradley v. Hunter*, 50 Ala. 265.

If there is an omission to enter an order refusing a discharge, the bankruptcy court may make it *nunc pro tunc*, if no rights of third parties have intervened which can be prejudiced thereby. *In re Drisko*, 13 B. R. 112; *s. c.* 14 B. R. 551.

A bankrupt whose discharge has been refused, may, upon the repeal of the bankruptcy law, apply for the benefit of a State insolvent law. *Fisher v. Currier*, 48 Mass. 424.

The refusal of a discharge by the district court protects the creditors whose debts were provable, against any discharge of the same debts by operation of any State law. *Ibid.*

If the debtor whose discharge has been refused, takes the benefit of the State insolvent law upon the repeal of the bankruptcy law, the creditors whose debts were provable in bankruptcy may prove their debts in insolvency, but in that case their debts will be barred by a discharge. *Ibid.*

ACT OF 1868, § 5112. In all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, is filed in the case at or before the time of the hearing of the application for discharge, but this provision shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the first day of January, eighteen hundred and sixty-nine.

Statute revised — July 27, 1868, ch. 258, § 1, 15 Stat. 227. Prior Statute — March 2, 1867, ch. 176, § 33, 14 Stat. 532.

ACT OF 1874, § 5112A (June 22, 1874, ch. 390, § 9, 18 Stat. 180).— That in cases of compulsory or involuntary bankruptcy, the provisions of said act, and any amendment thereof, or of any supple-

ment thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner and with the same effect as if he had paid such per centum of his debts, or as if the required proportion of his creditors had assented thereto. And in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number, and one-third in value. And the provision in section five thousand one hundred and twelve [thirty-three of said act of March second, eighteen hundred and sixty-seven] requiring fifty per centum of such assets is hereby repealed.

The amendment applies to pending cases; and any bankrupt, whether voluntary or involuntary, may obtain a discharge by complying with its provisions. In *re King*, 10 B. R. 556; s. c. 3 Dillon, 3; in *re Griffiths*, 10 B. R. 456; s. c. 1 A. L. T. (N. S.) 476; s. c. 10 A. L. J. 249; s. c. 1 Cent. L. J. 507; in *re Perkins*, 10 B. R. 529; s. c. 6 Biss. 185; in *re Louis Cerf*, 11 B. R. 143; s. c. 7 C. L. N. 79; in *re Jones & Hoyt*, 12 B. R. 48; s. c. 7 C. L. N. 162. Contra, in *re Charles J. Francke*, 10 B. R. 438; s. c. 7 Ben. 42; s. c. 1 A. L. T. (N. S.) 476; in *re George H. Shelden*, 12 B. R. 63.

In voluntary cases pending at the time of the passage of the amendment, the bankrupt need not show any percentage of assets, nor any assent of creditors in respect to debts contracted prior to January 1, 1869. In *re George H. Shelden*, 12 B. R. 63.

A voluntary bankrupt is only required to file the assent of the requisite proportion of the creditors to whom he is liable as principal debtor and who have proved their debts. In *re James C. Derby*, 12 B. R. 214.

A partner who is brought into bankruptcy by his copartner, must have assets to the required amount, or obtain the consent of the requisite proportion of the creditors, for such a proceeding is not involuntary or compulsory. In *re W. F. Wilson*, 13 B. R. 253.

The word "assets" means the proceeds of the bankrupt's property which are applicable to the payment of his debts. The subject-matter of this section points to this signification. Nothing else could pay debts. In this section the word "assets" is not synonymous with estate. In *re Frederick*, 3 B. R. 465; s. c. 1 L. T. B. 181; s. c. 2 C. L. N. 139.

The term "assets" is as comprehensive as "estate" or "effects." It includes all the estate of the bankrupt, not that only which is applicable to the payment of debts; but that applicable to the payment of costs and expenses as well. The term "assets" is not used to express the net balance to be distributed among the creditors, but means the entire estate of the bankrupt, irrespective of the use to which it may be appropriated by the court, and in determining the question whether the assets amount



to the requisite thirty per cent., the costs and expenses of the proceedings are not first to be deducted. In *re Kahley et al.*, 6 B. R. 189; s. c. 3 Biss. 169. Contra, in *re Vinton*, 7 B. R. 138.

What sum the estate or assets may be appraised at is by no means a true criterion of their value, or rather what they are "equal to." There may be as many differing opinions as to the value of a given piece of property, as the number of individuals whose judgment is sought. The true test as to value, when that value is to be used to pay creditors, is the amount the property will bring upon a sale by the assignee in accordance with law; what it produces in money with which to pay dividends to creditors and costs of proceedings, money being the only thing with which such payments can be made. In *re Van Riper*, 6 B. R. 573.

The word "assets" does not mean money actually realized. So restricted a construction should not be placed upon it. Where the bankrupt has acted in good faith, and performed his duty under the bankruptcy law, he is entitled to a discharge if, at the time he filed the petition, he was possessed of property fairly worth thirty per cent. of the debts proved against his estate, upon which he was liable as principal debtor. He ought not to be made the victim of circumstances over which he has no control. In *re Lincoln & Cherry*, 7 B. R. 334; 2 L. T. B. 241; s. c. 20 Pitts. L. J. 1.

The assets consist of the sum that remains after discharging all liens, and this surplus must equal thirty per cent. of the required claims. In *re W. H. Graham*, 5 B. R. 155; s. c. 28 Leg. Int. 317; in *re Van Riper*, 6 B. R. 573.

The proceeds of the bankrupt's property in the hands of his assignee, subject to be divided among his creditors, must at the time of the hearing of the application for the discharge, be equal to thirty per centum of the amount of the claims proved against his estate on which he was liable as principal debtor, in order to entitle him to a discharge without the assent of his creditors as provided for in this section. In *re Webb & Taylor*, 3 B. R. 720; s. c. 2 C. L. N. 313.

This provision does not admit of a fictitious or exaggerated valuation of his assets by the bankrupt, in his schedule or inventory, while, on the contrary, if the assets are at a fair and just estimate and valuation equal to thirty per cent. of the debts proved, the bankrupt is not to be denied his discharge by reason of any sacrifice made by the assignee or creditors to convert the assets into cash, or because of the absorption of so large a proportion of the proceeds by expenses as to prevent the payment of thirty cents on the dollar. In *re Thompson*, 2 Biss. 481.

In the absence of proof to the contrary, the proceeds in the hands of the assignee will be taken to be the true value of the estate. In *re Borden & Geary*, 5 B. R. 128; s. c. 5 Ben. 228.

A motion for the appointment of appraisers to ascertain the value of the assets, made before the first meeting of creditors, can not be entertained. In *re Frederick*, 3 B. R. 465; s. c. 1 L. T. B. 181; s. c. 2 C. L. N. 130.

The fixing of the liability of an indorser does not make him liable as a principal debtor when he otherwise would not be so liable. Although the

liability of an indorser, from being contingent, becomes absolute and fixed. It does not thereby become the liability of a principal debtor. When it is put into the shape of a judgment, the liability on such judgment becomes the liability of a principal debtor; but until then the fixed liability of an indorser is not the liability of a principal debtor. The maker of the note is the principal, or chief, or primary debtor. The indorser is the secondary debtor, liable only on the default of the maker after demand of payment and on due notice thereof. Such default and notice fix the liability of the indorser, but it still remains the liability of an indorser. It can not be established without showing how it became fixed, and it must thus necessarily be shown to be the liability of an indorser. None of the contingent liabilities, or contingent debts, spoken of in section 5068, whether those of drawer, indorser, surety, bail, guarantor, obligor for the debt of another person, or whatever else, can be regarded as liabilities of a principal debtor, until they have undergone some other change than merely becoming absolute and fixed in contradistinction of being contingent. In *re B. H. Loder*, 4 B. R. 190; s. c. 4 Ben. 125.

An indorsement of the note of a third party does not constitute the indorser a principal to the holder of a protested note so as to require his consent to a discharge. The words "principal debtor" are to be taken in their ordinary legal acceptation, and do not include such an indorser. The liability of an indorser is secondary to that of the maker, who is the principal debtor, and the character of the obligation remains unchanged notwithstanding it may have become fixed by demand and notice of non-payment. In *re Lewis B. Loder*, 4 Ben. 328.

The time of the hearing of the application for a discharge is the return day of the order to show cause, whether the original day or the adjourned day. At or before that day, the assent in writing to the discharge, if such assent is necessary, may and must be filed. No claim proved after that day can be counted among the claims which are to be taken into account in computing the number requisite to a discharge. In *re John B. Borst*, 11 B. R. 96.

A party who purchases claims against the debtor, at a discount with his own funds, holds the debts to their full amount, although he was also trustee, under an assignment. In *re Chas. P. Houghton*, 5 Law Rep. 321.

A discharge can not be granted without the assent of the requisite proportion of the creditors whose debts are existing and unpaid at the time of the hearing. Creditors who have given releases in pursuance of an assignment made prior to the commencement of the proceedings in bankruptcy, can not be recognized as creditors. In *re Aspinwall*, 3 Penn. L. J. 212.

When a creditor has once given his consent in writing, and the bankrupt has acted upon it, and other creditors have given theirs, and presumptively been influenced by one another's action in this respect, and the assent of the requisite number in value and amount is obtained and filed at the hearing, a creditor thus assenting has no absolute right, even on the day fixed for the hearing, to withdraw or cancel his assent. In *re Brent*, 8 B. R. 411; s. c. 2 Dillon. 129.

In the absence of consent by creditors, in voluntary cases, no matter when commenced or when the debts were contracted, the assets must be equal to thirty per cent., or no discharge can be granted. In *re Haviland Gifford*, 16 B. R. 135; s. c. 9 C. L. N. 389.

If the holder of a note assents to the discharge of the maker, without the consent of the indorser, he thereby releases the indorser. In *re David A. McDonald*, 14 B. R. 477; s. c. 24 Pitts. L. J. 42; s. c. 12 Pac. L. R. 99.

§ 5113. Before any discharge is granted, the bankrupt must take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter or thing specified as a ground for withholding such discharge, or as invalidating such discharge if granted.

Statute revised — March 2, 1867, ch. 176, § 29, 14 Stat. 531. Prior Statute — April 4, 1800, ch. 19, § 36, 2 Stat. 31.

On the return of the order to show cause, the register should require the bankrupt to take the oath provided for by this section. This oath is to be taken and subscribed before the granting of the certificate of conformity. It should be administered whether specifications have been filed or not. In *re Bellamy*, 1 B. R. 113; s. c. 1 Ben. 426; in *re E. Pulver*, 2 B. R. 313; s. c. 3 Ben. 65; in *re Frizelle et al.*, 5 B. R. 119.

When specifications are withdrawn after the oath has been taken, the oath should be again taken and subscribed after the withdrawal. In *re Machad*, 2 B. R. 352.

When a bankrupt dies before he has taken this oath, a discharge can not be granted. In *re O'Farrell et al.*, 2 B. R. 484; s. c. 3 Ben. 191; s. c. 1 L. T. B. 159; in *re Quinke*, 4 B. R. 92; s. c. 2 Bliss. 354.

The final oath is merely an item of indispensable evidence, without which the bankrupt is not entitled to his discharge, and it is sufficient if it be produced and filed on the hearing. In *re Robert A. Sutherland*, 1 Deady, 573.

If the bankrupt dies after the taking of the final oath and the granting of the certificate of conformity, the court has the power to order a discharge as on a date when the bankrupt was in life. *Young v. Ridenbaugh*, 11 B. R. 563; s. c. 2 Dillon, 239.

The presumption raised by a certificate of conformity which sets forth that the final oath has been taken, is not overcome by the mere fact that the oath is not on file. *Ibid.*

#### ACT OF 1898, CH. 3, § 14. Discharges, When granted.— \* \* \*

(b) The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant.

**ACT OF 1867, § 5114.** If it shall appear to the court that the bankrupt has in all things conformed to his duty under this Title, and that he is entitled, under the provisions thereof, to receive a discharge, the court shall grant him a discharge from all his debts, except as hereinafter provided, and shall give him a certificate thereof under the seal of the court.

Statute revised — March 2, 1867, ch. 176, § 32, 14 Stat. 532. Prior Statute — Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.

The provisions of this section, as to the prerequisites to a discharge mean that all the requirements of the act as to what steps are to be taken from the commencement of the proceedings to the end, must be conformed to as a prerequisite to the granting of a discharge, and not merely that the bankrupt has personally done what he is required to do. Before the discharge is granted, the register must certify that the bankrupt has complied with all the requirements of the act. In re Bellamy, 1 B. R. 64, 98; s. c. 1 Ben. 390, 426; s. c. 1 L. T. B. 22; in re Orne, 1 B. R. 79; s. c. 1 Ben. 420; in re Jabez Harris, 2 B. R. 105.

A special order of the district court is necessary to authorize the register to examine the papers and certify to the regularity of the proceedings. In re Bellamy, 1 B. R. 98, 113 s. c. 1 Ben. 426, 474.

When, on the return of the order to show cause before the register, a creditor appears to oppose the discharge, the register must make a certificate of the proceedings, stating the opposition, and return the papers into court in like manner as if there were no opposition. In re Hughes, 1 B. R. 226; s. c. 2 Ben. 85; s. c. 1 L. T. B. 45; in re Bellamy, 1 B. R. 98; s. c. 1 Ben. 426.

When specifications have been filed, the certificate of conformity should except the particulars covered by the specifications. In re Pulver, 2 B. R. 313; s. c. 3 Ben. 65.

It is the duty of the court to examine the record before granting the discharge, and if it appears that the bankrupt is not entitled thereto, to refuse it, even though creditors do not interpose objections. When the record of the bankrupt's examination shows that he has, since the passage of the bankruptcy act, lost money at gambling, the discharge must be refused. In re Wilkinson, 3 B. R. 286; s. c. 2 W. J. 250; s. c. 16 Pitts. L. J. 237.

No discharge can be granted when notice of the assignee's appointment has not been duly published. In re Bellamy, 1 B. R. 64; s. c. 1 Ben. 390; s. c. 1 L. T. B. 22; in re Strachan, 3 B. R. 601. Contra, in re Littlefield, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164.

Nor when the warrant has not been properly served upon the creditors. Proceedings subsequent to an irregularity must be set aside, and the same proceedings had again with due regularity. In re Erie L. Hall, 2 B. R. 192; s. c. 16 Pitts. L. J. 52.

Where there is any failure of jurisdiction, as where, by mistake, the case has been conducted by the wrong register, the discharge may be

refused; so, probably, as a matter of practice, the meetings ought to be duly warned and held before the discharge can be granted. In *re Littlefield*, 3 B. R. 57; s. c. *Lowell*, 331; s. c. 1 L. T. B. 164.

The omission to call the second and third meetings at the proper times is no ground for withholding the bankrupt's discharge. In *re Littlefield*, 3 B. R. 57; s. c. *Lowell*, 331; s. c. 1 L. T. B. 164. *Contra*, in *re Bushey*, 2 B. R. 685.

The granting of a discharge may be suspended until the assignee shall have filed and settled his accounts. It is a part of the bankrupt's duty to his creditors to see that the assignee's account is exhibited in proper season. In *re Pierce & Holbrook*, 3 B. R. 258; s. c. 16 *Pitts. L. J.* 204.

When it appears that the bankrupt has innocently omitted certain property from his schedules, the granting of the discharge will be suspended until he shall have properly amended his schedules. In *re Connell*, 3 B. R. 443.

When the bankrupt has omitted the names of certain creditors from his schedules, he must make an amendment by inserting such names before a discharge will be granted. Petitions in bankruptcy must be full and true in point of fact; otherwise no discharge will be granted. In *re Redfield*, 2 Ben. 72.

A discharge will be refused if the bankrupt omits from his schedule debts which he claims are barred by the statute of limitations. In *re John H. H. Cushman*, 7 Ben. 482.

When an order for the bankrupt's wife to attend for examination has been served upon the bankrupt, though not served upon her, and she has failed to attend at the time and place specified, the bankrupt is not entitled to a discharge, unless he proves to the satisfaction of the court that he was unable to procure her attendance. In *re Van Tuyl*, 2 B. R. 579; s. c. 3 Ben. 237.

A discharge will not be granted until, under Rule VII, all the papers relating to the case are filed by the register in the office of the clerk of the district court. In *re Bellamy*, 1 B. R. 98; s. c. 1 Ben. 426.

The omission of the assignee to obtain the assignment, or have it recorded, is no ground for withholding a discharge. In *re Wm. H. Pierson*, 10 B. R. 107.

If the filing of specifications was unauthorized and null, a discharge may be granted *nunc pro tunc* as of the time when by law the bankrupt was entitled to it. *Creditors v. Williams*, 4 B. R. 580; s. c. 2 L. T. B. 166.

The bankrupt is in no manner or degree reinvested by the discharge with control over the estate which he surrendered in bankruptcy. In *re Geo. W. Anderson*, 9 B. R. 360.

The discharge does not take effect until it is signed by the judge. *Pesoa v. Passmore*, 4 *Yeates*, 139.

The original discharge is retained in the district court, and a copy is granted to the bankrupt. *Pennell v. Percival*, 13 Penn. 197; in *re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.

§ 5115. The certificate of a discharge in bankruptcy shall be in substance in the following form:

District court of the United States, District of  
Whereas                      has been duly adjudged a bankrupt under the Revised Statutes of the United States, Title "Bankruptcy," and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said                      be forever discharged from all debts and claims which by said Title are made provable against his estate, and which existed on the                      day of                      , on which day the petition for adjudication was filed by (or against) him; excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy. Given under my hand and the seal of the court. at                      , in the said district, this                      day of                      .

(Seal.)

, Judge.

Statute revised — March 2, 1867, ch. 176, § 32, 14 Stat. 532.

§ 5116. No person who has been discharged, and afterwards becomes bankrupt on his own application, shall be again entitled to a discharge whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three-fourths in value of his creditors who have proved their claims is filed at or before the time of application for discharge; but a bankrupt who proves to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

Statute revised — March 2, 1867, ch. 176, § 30, 14 Stat. 532. Prior Statutes — April 4, 1800, ch. 19, § 57, 2 Stat. 35; Aug. 19, 1841, ch. 9, § 12, 5 Stat. 447.

ACT OF 1898. CH. 3, § 17. **Debts not Affected by a Discharge.** — (a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have

not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity. See *post*, p. 699.

A debtor may waive a discharge, and allow judgment to be recovered against him for the original debt. *Dewey v. Moyer*, 16 B. R. 1.

Where debtor has waived his discharge as a defense, it can not be raised by one who is in possession of property transferred by the debtor with intent to defraud creditors, in an action to set aside such transfer. *Ibid*.

Bankruptcy court has no jurisdiction to relieve against a judgment obtained against a bankrupt in a suit brought against him after his adjudication, in which, for any cause, he has failed to plead his discharge. *In re Ferguson*, 16 B. R. 530.

Even if it had such jurisdiction, it would not interfere to relieve the bankrupt against the laches of his counsel and himself. *Ibid*.

Discharge in bankruptcy releases bankrupt from liability as surety on a guardian's bond. *Reitz v. The People*, 16 B. R. 96; *Ex parte Taylor*, 16 B. R. 40.

Where sureties on an appeal bond are discharged in bankruptcy (where, as in Mississippi, a judgment against them follows a judgment against principal) pending an appeal, they must plead same in order to avail themselves of it as a defense. *Jones v. Coker*, 16 B. R. 343.

Where a new promise to pay is made after a discharge, such discharge will not preclude a recovery, and old debts from which bankrupt has been discharged are sufficient consideration for subsequent confession of judgment for the same indebtedness. *Classen v. Schoeneman*, 16 B. R. 98; *Dewey v. Moyer*, 16 B. R. 114.

Discharge does not operate as a payment, but is simply a bar to enforcement of the obligation, and unless pleaded in defense by debtor it is waived. *Ludelling v. Felton*, 17 B. R. 310.

Discharge of husband can not be pleaded by the wife in bar of action against her, under laws of Louisiana, to recover her half of a community debt, where she has accepted a community. *Ibid*.

Discharge of a bankrupt judgment debtor releases a judgment recovered on a provable debt pending bankruptcy. *In re Stansfield*, 16 B. R. 268.

Where the bankrupt bought the business of another, agreeing to pay his debts and hold him harmless, a discharge will release him. *Brown et al. v. Broach et al.*, 16 B. R. 296.

The better and more logical pleading is not to attempt to avoid a discharge by averments and declarations, but to reply such matter in response to plea. *Ibid*.

A bankrupt in a given proceeding must be discharged as to all his debts, or from none. *In re Plumb*, 17 B. R. 76.

Where one member of a firm is adjudged a bankrupt without any adjudication against the firm, and there were at the time firm assets, the estate of firm is not in bankruptcy so as to make a discharge operative as to the firm debts. *Ibid.*

Discharge bars collection of a claim for purchase money of land which has been allotted to debtor as a homestead in bankruptcy proceedings. *Hoskins v. Wall*, 17 B. R. 314.

A discharge in bankruptcy can not be set up as a general defense to an action to set aside a conveyance in fraud of creditors, pending at time of filing petition, where such creditor has not proved his claim in bankruptcy proceedings, and the assignee has not interfered in the cause in any way. *Phelps v. Curts*, 16 B. R. 85.

But the discharge may be set up in such action in bar of a personal judgment against the bankrupt, other than the subjection of the property and claims reached by the creditors' bill to satisfaction of the judgment. *Ibid.*

Liability of a factor for proceeds of goods consigned to him for sale is released by his discharge in bankruptcy. *In re Smith et al.*, 18 B. R. 24.

Defendant sold plaintiff premises by warranty deed, and at the same time gave him a writing by which he agreed to pay off a certain mortgage which was a lien upon the premises. Defendant was afterward adjudged bankrupt and received his discharge. Subsequently the mortgage was foreclosed and the premises sold. In an action for breach of warranty: Held, plaintiff should have proved his claim in the bankruptcy proceedings as a contingent debt, and not having done so his claim is barred by the discharge. (Law of 1867.) *Parker v. Bradford*, 17 B. R. 485.

Where, by terms of a lease, the bankrupt is to pay rent at fixed and stated periods, the rent is to be regarded as growing due from day to day. The discharge releases bankrupt from liability for the proportionate part up to time of bankruptcy, but does not affect his liability for the part growing due after that time. *Treadwell et al. v. Mardin et al.*, 18 B. R. 353.

While a promise made after receiving a discharge in bankruptcy, to pay a debt from which the promisor has been discharged, is valid, such promise before the discharge has been obtained is without consideration and cannot be enforced. *Ogden et al. v. Redd*, 18 B. R. 317.

Under the law of 1867, a discharge in bankruptcy would not release lien of judgment which was not proved. *Darsey v. Mumpford*, 17 B. R. 181.

Where, under contract for manufacture and sale of iron, plaintiff is to own iron manufactured, and the proceeds thereof, after payment to plaintiff of his advances, and a percentage on the net sales, and the amount of a certain note are to be paid over to defendant and another party, an indebtedness of defendant for the proceeds of sales, made with knowledge of plaintiff, which he fails to pay over, is not a debt created while acting in a fiduciary capacity. *Barber v. Sterling*, 17 B. R. 218.

Default of a factor in not making payment to his principal is not a fraud, nor is the debt created by such defalcation one created "while acting in any fiduciary character." *Keime v. Graff & Co.*, 17 B. R. 319.



Only technical or special trusts, as contradistinguished from those which the law implies from the contract, are within meaning of this section. *Ibid.*

The fraud referred to here is positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality. *Neal v. Scruggs*, 17 B. R. 102.

§ 5117. No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.

Statute revised — March 2, 1867, ch. 176, § 33, 14 Stat. 532. Prior Statute — Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440.

The word "debt" is used as synonymous with "claim." *Stokes v. Mason*, 12 B. R. 498; s. c. 10 R. I. 261.

**Fraudulent Debts.**— If the bankrupt obtained the possession of goods under a contract to pay cash on delivery, and at once shipped them beyond the control of the vendor, and then refused payment, such conduct may warrant the conclusion that the debt was created by fraud. *Classen v. Schoeneman*, 16 B. R. 98.

If the false representation as to means did not induce the creditor to sell the goods then the debt is not created by fraud. *In re Martin Alsberg*, 16 B. R. 116.

If the creditor was induced to sell the goods by false representation as to means, then the debt was created by fraud. *Ibid.*

If the bankrupt, at the time of purchasing the goods, did not intend to pay for them in whole or in part, then the debt was created by fraud. *Ibid.*

A discharge releases the bankrupt from liability as surety on a guardian's bond. *Reitz v. People*, 16 B. R. 96.

The statute does not say "actual" fraud, or "moral" fraud, or qualify the word by any other adjective. It uses only the generic word "fraud," which must be construed in its general sense. It, therefore, includes implied fraud. *Jones v. Clark*, 25 Gratt. 642.

The debt must be tainted with fraud in its inception. The vice must come into existence with the debt. If the contract was fair and honest, when made, the discharge will release the bankrupt from his liability, although he was subsequently guilty of fraudulent conduct in respect to the debt. *Brown v. Broach*, 52 Miss. 536.

In order to render a debt fraudulent when contracted under a representation of the bankrupt, the intention to deceive is an essential element of the fraud. *Broadnax v. Bradford*, 50 Ala. 270.

A claim for deceit on account of certain false and fraudulent representations and inducements, whereby the bankrupt procured from the plain-

tiff an assignment of a complete stock in trade, including goods, choses in action, etc., in exchange for a note of much less value than was represented, if not wholly worthless, is not discharged. *In re Devoe*, 2 B. R. 27; s. c. *Lowell*, 251; s. c. 1 L. T. B. 90.

A claim against a purchaser of property from an executor on account of his having fraudulently participated with the latter in a devastavit, is a debt created by fraud, and is not released by a discharge. *Jones v. Clark*, 25 Gratt. 642.

A bond given by a claimant in order to obtain the delivery of property is not a debt created by fraud, although he subsequently endeavored to sustain his claim by false testimony. *U. S. v. Rob Roy*, 13 B. R. 235; s. c. 1 Woods, 42.

A certificate of discharge in bankruptcy will not defeat the plaintiff's right of action in tort for the defendant's false and fraudulent representations. *Morse v. Hutchins*, 102 Mass. 439.

A purchase of goods with the intent never to pay for them is such a fraud as prevents the discharge from releasing the purchaser from the debt. *Stewart v. Emerson*, 8 B. R. 462; s. c. 52 N. H. 301; s. c. 6 L. T. B. 250.

A judgment in a court of law obtained in an action of tort, is a debt dischargeable under the bankruptcy act. *Manning v. Keyes*, 9 R. I. 224; *in re Wiggers*, 2 Biss. 71; *in re Samuel Book*, 3 McLean, 317.

A discharge will release the debtor from his liability to his cotenants for his share of the rents, issues and profits of the property held in common. *Flanagan v. Cary*, 37 Tex. 67.

A judgment does not convert an unliquidated demand for damages into a debt. The record of the action in which the execution issues may be looked at, and if it shows a material and traversable allegation of fraud as its sole foundation, the debt or demand may fairly be said to be one founded in fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge will not release him. The execution is a writ issued in the cause. *In re Whitehouse*, 4 B. R. 63; s. c. *Lowell*, 429; *in re Patterson*, 1 B. R. 307; s. c. 2 Ben. 155; *Flanagan v. Cary*, 37 Tex. 67; *Warner v. Cronkhite*, 13 B. R. 52; s. c. 6 Biss. 453; *Reid v. Martin*, 11 N. Y. Supr. 590; *Taylor v. Renn*, 8 C. L. N. 410; *Horner v. Spelman*, 78 Ill. 206.

Whether a judgment was for fraud or not is a question to be determined by the court from the record, and should not be submitted to a jury. *Flanagan v. Pearson*, 14 B. R. 37; s. c. 42 Tex. 1.

Where the record shows a material and traversable allegation of fraud as its sole foundation, the judgment need not, on its face, show that the demand originated in fraud. *Warner v. Cronkhite*, 13 B. R. 52; s. c. 6 Biss. 453.

If the plaintiff sues in assumpsit on the contract, he is not estopped by the form of his action to answer the plea of discharge by the replication of debt created by fraud. He does not by such a replication attempt to rescind, or invalidate, or renounce the contract, but he affirms it, and claims that the debt is a valid subsisting debt. In the declaration he asserts a

debt. In the replication he asserts the same debt. He avers the fraud, not to avoid the contract himself, but to show that the defendant can not avoid it; not to show that by reason of the fraud the debt declared upon was never created, but to show that being created by fraud, it was not discharged under the bankruptcy act — not to show that there is no such debt, but to show that there is such a debt notwithstanding the discharge. *Stewart v. Emerson*, 8 B. R. 462; s. c. 51 N. H. 301; s. c. 6 L. T. B. 250; *Broadnax v. Bradford*, 50 Ala. 270.

If the record shows that the debt was created by contract, the plaintiff can not, when a discharge is pleaded in bar to the judgment, be allowed to show that the debt sought to be collected was created by fraud. *Palmer v. Preston*, 45 Vt. 154; *Shuman v. Strauss*, 10 B. R. 300; s. c. 34 N. Y. Supr. 6; s. c. 52 N. Y. 404.

Whether the debt was created by fraud will not be determined upon conflicting affidavits, on a motion for leave to issue an execution. *Shuman v. Strauss*, 10 B. R. 300; s. c. 52 N. Y. 404; s. c. 34 N. Y. Supr. 6.

A claim arising from fraud may be prosecuted in any proper form of suit after the question of discharge has been determined, although it has been proved. *Stokes v. Mason*, 12 B. R. 498; s. c. 10 R. I. 261.

If the defendant in an action of trover pleads a discharge, the plaintiff may reply that the debt was created by fraud. *Ibid*.

A discharge is no bar to an action for a debt created by fraud, although the creditor proved his claim and received a dividend thereon. *Ibid*.

If the bankrupt bought the business of another under an agreement to indemnify him against all his liabilities, a discharge will release him although he falsely stated that he had paid a debt of the latter. *Brown v. Broach*, 52 Miss. 536.

**Fiduciary Debts.**— The language seems to have been intentionally made so broad as to extend to a debt created by a defalcation of the bankrupt while acting in any fiduciary capacity and not to be confined to any special fiduciary capacity. In *re Seymour*, 1 B. R. 29; s. c. 1 Ben. 348.

The construction of the bankruptcy law must be the same all over the United States, and can not be varied in each State by the local law. To understand the use of terms employed in it, resort must be had to their meaning in the common law, and not in the local law of the State where the bankrupt may happen to be domiciled. *Austill v. Crawford*, 7 Ala. 335.

The phrase implies a fiduciary relation existing previously to, or independently of, the particular transaction from which the debt arose. A deposit of bills of exchange, with instructions to collect and apply the proceeds to the payment of certain debts, and to pay the balance to the depositor, does not create a fiduciary relation between the depositor and the bailee. The meaning of the phrase "fiduciary capacity," having been ascertained, and declared by a judicial construction of the act of 1841, is affixed to the general term, and this fixed definition is carried into the new statute. *Cronan v. Cutting*, 4 B. R. 667; s. c. 104 Mass. 245.

A claim against a person for withholding the proceeds arising from the sale of goods consigned to him to be sold on commission, is a debt con-

tracted by him in a fiduciary capacity. In *re Seymour*, 1 B. R. 29; s. c. 1 Ben. 348; in *re J. H. Kimball*, 2 B. R. 204, 354; s. c. 2 Ben. 554; s. c. 6 Blatch. 292; *Whitaker v. Chapman*, 3 Lans. 155; s. c. 1 L. T. B. 249; s. c. 4 L. T. B. 92; *Lemcke v. Booth*, 5 B. R. 351; s. c. 47 Mo. 385; *Rudge v. Rundle*, 1 N. Y. Supr. 649; *Gray v. Farran*, 2 Cln. 426; *Meador v. Sharp*, 14 B. R. 192; s. c. 54 Ga. 128; *Banning v. Bleakley*, 27 La. An. 257. Contra. *Chapman v. Forsyth*, 2 How. 202; *Commercial Bank v. Buckner*, 2 La. An. 1023; *Hayman v. Pond*, 48 Mass. 328; *Austill v. Crawford*, 7 Ala. 335; *Woolsey v. Cade*, 15 B. R. 238; s. c. 4 Cent. L. J. 202; *Owesley v. Cobia*, 15 B. R. 489; s. c. 9 C. L. N. 323.

The debt due from a collector of taxes for a municipal corporation to the corporation for taxes received and not accounted for, is a fiduciary debt. *Morse v. Lowell*, 48 Mass. 152.

The receipt of money to be carried to another place to pay a note does not create a debt of a fiduciary character. *Phillips v. Russell*, 42 Me. 300.

A receipt for the property given by the bankrupt to an officer who held an attachment against him, does not create a debt of a fiduciary character. *Fowles v. Treadwell*, 24 Me. 377.

If the bankrupt receives money as agent, to be used in a particular way or for a specific purpose, for the use of the principal, then the money is held by him in a fiduciary capacity. *Matteson v. Kellogg*, 15 Ill. 547; *Flagg v. Ely*, 1 Edm. Sel. Cas. 206.

If the bankrupt receives money under an assignment and a judgment in trust to pay certain creditors of the assignor, the debt is a fiduciary debt. *Kingsland v. Spalding*, 3 Barb. Ch. 341.

A general deposit, with authority to the bailee to mix the money with his own and use it until applied for by the depositor, does not create a fiduciary debt. *Hervey v. Devereux*, 72 N. C. 463.

A claim by a conditional vendor for a conversion of the property is founded upon a breach of trust, and is not barred by a discharge. *Johnson v. Worden*, 13 B. R. 335; s. c. 47 Vt. 457.

A conditional vendor by proving his debt does not lose his claim for the conversion of the property. *Ibid.*

If the maker of a promissory note gives money to his surety to pay to the holder of the note, and the surety does not so apply it, this does not create a fiduciary debt. *Bissell v. Couchane*, 15 Ohio, 58.

A debt which arises from a consignment of goods to the debtor to sell under an agreement that he shall have as commissions all that can be realized above a certain sum, is a fiduciary debt. *Treadwell v. Holloway*, 12 B. R. 61; s. c. 46 Cal. 547.

An auctioneer acts in fiduciary capacity or character, and his discharge will not relieve him from liability for the proceeds of goods placed in his hands for sale. *Jones v. Russell*, 11 B. R. 478; s. c. 44 Ga. 400; in *re Horace Lord*, 5 Law Rep. 258.

A discharge does not relieve a guardian from his fiduciary obligation as such, and if the surety discharges these and obtains a judgment therefor, he may levy upon the property of the bankrupt acquired after his discharge. *Carlin v. Carlin*, 8 Bush, 41; *Halliburton v. Carter*, 10 B. R. 359; s. c. 55 Mo. 435.

The surety upon the bond of a public officer is not liable in a fiduciary capacity. *Saunders v. Comm.*, 10 Gratt. 494; *Fowler v. Kendall*, 44 Me. 448.

The liability of a surety on a guardian's bond is not a fiduciary debt. The sureties of a guardian have no control of his conduct. Their obligation is entirely different from his. They undertake to pay money on his account, while he in addition engages to be honest, faithful, and careful. It is for failure in this latter respect that the law refuses to release him from his debt. *Jones v. Knox*, 8 B. R. 559; s. c. 46 Ala. 53; *Boule v. Pucket*, 7 Humph. 169; in re *Samuel T. Taylor*, 16 B. R. 40.

If the guardian gives his note under seal to the ward's husband, in settlement of his account, and receives a release from them, he is not liable thereon in a fiduciary capacity. *Coleman v. Davies*, 45 Ga. 489.

An agreement by an executor guaranteeing the payment of a demand against the estate is not a debt created by him while acting in a fiduciary capacity. In making the promise he acts outside of his character as executor, and he is not acting in a fiduciary character as respects the party to whom it is made. *Amoskeag Manuf. Co. v. Barnes*, 49 N. H. 312.

A surety upon a constable's bond is not a public officer, and will be released from liability by a discharge. *McMinn v. Allen*, 67 N. C. 131.

An attorney who collects a debt for a client acts in a fiduciary capacity, and will not be released from his obligation to pay the money to his client by a discharge. *Heffren v. Jayne*, 39 Ind. 463; *Heffren v. Leroy*, 39 Ind. 471; *White v. Platt*, 5 Denio, 269; *Flanagan v. Pearson*, 14 B. R. 37; s. c. 42 Tex. 1. Contra, *Wolcott v. Hodge*, 81 Mass. 547; *Williamson v. Dickens*, 5 Ired. 259.

If an attorney received a note not in a professional character but as a gratuitous bailee, and his liability is merely for negligence in failing to return it, he is released by a discharge. *McAdoo v. Lummis*, 43 Tex. 227.

If an agent is authorized to carry the money received into account, and to report sales and pay over balances only monthly, the debt due to his principal is not a fiduciary debt. *Grover v. Clinton*, 8 B. R. 312; s. c. 5 Biss. 324.

If a fiduciary debt was merged in a judgment prior to the commencement of the proceedings in bankruptcy, it is released by a discharge. *Wolcott v. Hodge*, 81 Mass. 547.

The fiduciary creditor may sue the debtor, although he did not appear before the bankruptcy court and have his debt excepted from the operation of the discharge. *Chapman v. Forsyth*, 2 How. 202.

A judgment rendered in an action where the pleading raised the issue whether the defendant acted in a fiduciary capacity is conclusive evidence that the debt was so contracted. *Flanagan v. Pearson*, 14 B. R. 37; s. c. 42 Tex. 1.

A replication to a plea of a discharge, that the debt is of a fiduciary character, is bad, for it states a legal conclusion instead of specially disclosing the facts, so that the court may determine whether the debt is founded on such a trust as is expected from the operation of the statute. *Mabry v. Herndon*, 8 Ala. 848.

The burden of proving that the debt is of a fiduciary character is on the creditor, and if he fails to make the proof, the debt will be taken to be one of an ordinary character. *Sherwood v. Mitchell*, 4 Denio, 435.

A debt which consists of a judgment rendered upon a promissory note is *prima facie* a debt that is barred by a discharge. *Hayes v. Ford*, 15 B. R. 569.

**ACT OF 1898, CH. 3, § 16. Codebtors of Bankrupts.**—(a) The liability of a person who is a codebtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

ACT OF 1867, § 5118. No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.

Statute revised — March 2, 1867, ch. 176, § 33, 14 Stat. 532. Prior Statutes — April 4, 1800, ch. 19, § 34, 2 Stat. 30; Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.

This section only applies to the discharge in bankruptcy merely, and does not refer to, or have in view, any act of the parties effecting a release of liability at law or in equity. In re David A. McDonald, 14 B. R. 477; s. c. 24 Pitts. L. J. 42; s. c. 12 Pac. L. R. 99.

The creditor may sue any one else liable upon the same debt, and proceedings pending against others thereon and unsatisfied judgments already obtained against others thereon, are not affected, discharged, or surrendered by proving the debt. In re Levy et al., 1 B. R. 327; s. c. 2 Ben. 169; Payne v. Able, 4 B. R. 220; s. c. 7 Bush. 344; Moore v. Waller, 1 A. K. Marsh. 488.

The assignee of a promissory note is not bound to follow the maker into bankruptcy, in order to fix the liability on the assignor. *Booth v. Storrs*, 3 C. L. N. 210.

The fact that the principal in a note secured by a mortgage given by the surety on his own lands has taken the benefit of the bankruptcy act does not relieve the surety, or affect the rights of any of the parties under the mortgage, and a suit for foreclosure may be instituted. *Citizens' National Bank v. Leming*, 8 I. R. R. 132.

The use of the word "partner" shows that it was contemplated that one partner might, under the antecedent provisions of the act, be entitled to be discharged for or in the respect of partnership debts. In re Wm. Downing, 3 B. R. 748; s. c. 1 Dillon. 33; s. c. 1 L. T. B. 207.

When a firm which has been dissolved by the death of one of the partners is put into bankruptcy by proceedings against the surviving partner, the discharge of the surviving partner will not operate to release the estate of the deceased partner from liability. In re R. Stevens, 5 B. R. 112; s. c. 1 Saw. 397.

If the obligation is joint, an obligor is a necessary party to the suit, although he has received a discharge in bankruptcy. *Camp v. Gifford*, 7

Hill, 169. *Contra*, Dorn v. O'Neill, 6 Nev. 155; Jenks v. Opp, 12 B. R. 19; a. c. 43 Ind. 108.

If the fact of discharge arises after suit brought, and is pleaded by the bankrupt debtor, the creditor has the right to admit that such discharge has been obtained, and take a judgment against the other joint defendant alone. Dorn v. O'Neill, 6 Nev. 155.

The sureties upon an auctioneer's bond are not relieved by the discharge of the principal from liability for the proceeds of goods placed in his hands for sale. Jones v. Russell, 11 B. R. 478; a. c. 44 Ga. 460.

The discharge of the principal obligor in a forthcoming bond does not release the sureties. Garnet v. Roper, 10 Ala. 842.

The discharge of the debtor does not release the sureties upon a jail bond from liability for a breach which occurred after the commencement of the proceedings in bankruptcy. Dyer v. Cleveland, 18 Vt. 241.

The surety on an appeal bond remains liable, although the principal becomes a bankrupt and obtains his discharge while the appeal is pending. Hall v. Fowler, 6 Hill, 630; Knapp v. Anderson, 15 B. R. 316; a. c. 14 N. Y. Supr. 295.

The discharge of the maker of a note does not release the indorser from his liability. King v. Central Bank, 6 Ga. 257.

Discharge of bankrupt does not impair remedy of creditor against sureties upon a bond given to dissolve an attachment issued more than four months before commencement of proceedings. *In re Albrecht*, 17 B. R. 287.

Certain credits had been garnished in the hands of third persons in a State court, more than four months before commencement of bankruptcy proceedings, and the garnishment had been released by giving a bond to pay the judgment. Held, plaintiff had a right to prosecute the suit, so far as to fix liability of sureties upon bond, notwithstanding the discharge of the bankrupt. *Ibid*.

Maker of accommodation paper not discharged from liability by fact of holder thereof, knowing its character, entering into a composition in bankruptcy proceedings instituted against the indorsers. Guild v. Butler, 16 B. R. 347.

Where a creditor, with knowledge of debtor's insolvent condition, accepts payment of his debt, in fraud of the bankruptcy law, without consent of the surety or indorser, the latter is thereby discharged from liability, although the assignee of the debtor subsequently recovers back such fraudulent payment. Northern Bk. of Ky. v. Cooke, 18 B. R. 306.

If a mortgage, pledge or lien is given by a principal debtor to secure his surety, and both become insolvent, the holders of the debts for which the surety is bound have an equity to require the property to be applied to the discharge of their debts specifically. *Ex parte Morris*, *in re Foye*, 16 B. R. 572. (Under law of 1808, such creditors are treated as secured creditors. Sec. 1, Clause 23, Law of 1808.)

But if the surety has been discharged by the negligence of the creditors, or if the state of the accounts between the parties is such that the surety has lost his lien, the creditors have no equity. *Ibid*.

The giving of time to the maker of a note for a valuable consideration, after he has received his discharge, does not release the indorser, for he can prove the liability against the bankrupt's estate. *Tiernan v. Woodruff*, 5 McLean, 350.

The discharge of one judgment debtor does not release or affect the other joint debtors. The judgment being joint, it is necessary to the validity of the execution that it shall conform to the judgment, and a joint execution against all the debtors is regular. *Linn v. Hamilton*, 34 N. J. 305. Vide *Boyd v. Vanderkamp*, 1 Barb. Ch. 273.

The sureties in a replevin bond, for the purpose of reducing the damages, may prove that the goods so replevined have never been paid for, although the notes given therefor are not in their possession, if the assignee of the principal has tendered the notes to the plaintiff, and he has refused them and prevented the sureties from getting them. *Seldner v. Smith*, 41 Md. 602.

A surety who is sued after the principal has been adjudged bankrupt, can not set off usury paid by his principal to the creditor on contracts other than the one sued on. *Woolfolk v. Plant*, 46 Ga. 422.

A careful perusal of this clause will show that it only applies to a surety who contracted to become liable for the payment of the debt, and not for the payment of the judgment which might be entered in a particular action. It clearly contemplates a case where the surety contracts to become liable with the principal for the payment of the debt. When a discharge is pleaded in the appellate court so that no judgment can be rendered against the defendant, a surety on an appeal bond conditioned to pay such judgment as might be entered in the appellate court, is released. As no judgment was rendered against his principal, no liability attached to him. *Odell v. Wooten*, 4 B. R. 183; s. c. 38 Ga. 225; *Martin v. Kilbourn*, 1 Cent. L. J. 94.

This clause applies to persons who are liable for the debt of the bankrupt which existed before, and is discharged by, the proceedings in bankruptcy. A bond given to dissolve an attachment is not such a debt. It does not become of the nature of a debt until the contingency arises upon which it is to be made operative—to-wit, a judgment valid against the principal and which he is bound to pay. When a judgment is rendered for the defendant upon a plea of a discharge in bankruptcy, the bond is discharged, not by the proceedings in bankruptcy, but by the determination of the contingency upon which the obligation of the bond is made to depend. *Carpenter v. Turrell*, 100 Mass. 450; *Payne v. Able*, 4 B. R. 220; s. c. 7 Bush. 344; *Williams v. Atkinson*, 37 Tex. 16. Contra, *Holyoke v. Adams*, 10 B. R. 270; s. c. 2 N. Y. Supr. 1; s. c. 8 N. Y. Supr. (Hun) 223.

The discharge of a debtor in bankruptcy, after a bond requiring him to take the poor debtor's oath has become absolute by breach of the condition, can not avail the sureties as a defense. After such breach, the right to surrender the principal no longer exists, and the subsequent discharge of the debtor can not avail the sureties. Although the discharge releases the debtor, it can not release the sureties. *Clafin v. Cogan*, 48 N. H. 411.



It was not the intent of Congress to do anything more than to declare that the act should not be construed so as to discharge sureties, and this was done not so much to fix the law of the case, as by way of caution to prevent the act from being construed to have an effect that by its terms it would not have. In other words, the contract of a surety, as it is understood in the commercial world, is always conditioned that the surety shall not be discharged by the bankruptcy of the principal, and the provisions of the act are only in furtherance of, and declaratory of, what would have been true had they not been put in the act. The Code of Georgia does not have the effect to release the surety upon the discharge of the principal. *Phillips v. Solomon*, 42 Ga. 192.

If a debtor upon his arrest gives a bond to take the poor debtor's oath within one year from the date, or surrender himself at the jail at the expiration of that time, and then files a petition in bankruptcy within the year and obtains a discharge, the discharge will not release the sureties if the bond is forfeited. *Goodwin v. Stark*, 15 N. H. 218.

Where the bankrupt leaves the prison limits after he receives his discharge, the discharge is a good defense for the sureties in an action on the jail bond. *Kirby v. Garrison*, 21 N. J. 176.

The discharge does not extinguish the debt, but merely relieves the bankrupt from his personal liability. It does not, therefore, release a party who has covenanted to pay a certain rate of interest until the principal debt is paid. *Bowery Savings Bank v. Clinton*, 2 Sandf. 113.

A promise by a third person to deliver certain property taken under an attachment, is not released or affected by the subsequent bankruptcy and discharge of the debtor whose property is so attached. *Towle v. Robinson*, 15 N. H. 408.

The surety on an administrator's bond is not released by the discharge of the principal. *Moore v. Waller*, 1 A. K. Marsh. 488.

A discharge of the principal under a petition filed after the return day of the sci. fa. issued against the bail, does not release the bail. *Bennett v. Alexander*, 1 Cranch C. C. 90.

The discharge of the principal in a replevin bond, and the delivery of the goods to his assignee in bankruptcy, does not operate to release or discharge the sureties. *Flagg v. Tyler*, 6 Mass. 33.

When the bankrupt is discharged, the court will on motion discharge his bail by ordering an exoneration to be entered. *Comm. v. Huber*, 5 Penn. L. J. 331; *McCausland v. Waller*, 1 H. & J. 156.

A judgment in favor of a surety on a plea of his discharge in an action upon an administration bond is no defense to an action for contribution by a cosurety who was codefendant in that suit, and who has paid the judgment. *Miller v. Gillespie*, 59 Mo. 220.

A failure to prove a note against the principal for the purpose of obtaining a dividend thereon will not release a surety. *Clopton v. Spratt*, 52 Miss. 251.

ACT OF 1867, § 5119. A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sec-

tions, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands. The certificate shall be conclusive evidence in favor of such bankrupt of the fact and regularity of such discharge. See *ante*, p. 688.

Statute revised — March 2, 1867, ch. 176, § 34, 14 Stat. 533. Prior Statutes — April 4, 1800, ch. 19, § 34, 2 Stat. 30; Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.

It was not intended by any of the provisions of the bankruptcy act that the bankruptcy court should pass, in a plenary manner, upon the question whether a particular claim will or will not be released by a discharge. That inquiry is one properly to be made only by the court in which a direct suit on the debt is pending. When the discharge is pleaded, the question of the extent of its operation upon the debts of the bankrupt, and whether a particular debt is or is not discharged by it, comes up for determination by the court in which it is pleaded, and the determination will be a binding judgment between the parties. In *re J. H. Kimball*, 2 B. R. 204; s. c. 2 Ben. 554; s. c. 6 Blatch. 292; in *re M. Rosenberg*, 2 B. R. 236; s. c. 3 Ben. 14; in *re J. S. Wright*, 2 B. R. 142; s. c. 36 How. Pr. 167; s. c. 2 Ben. 509.

The fact that the assignee embezzled all the funds is no defense against a demand, even though it was proved, for nothing arising in the proceedings in bankruptcy can protect the bankrupt but a certificate of discharge duly obtained. *Whitney v. Crafts*, 10 Mass. 23.

The proving of a note payable in specific articles is equivalent to a demand upon the bankrupt for them. A demand on him would have been fruitless, as all his property was out of his control and vested in the assignee, who held the estate in trust, as well for him as his creditors, to pay his debts. The assignee, having the fund, was the proper person on whom the demand ought to be made, and the proving of the claim was the making of a demand on the assignee. If the debtor fails to obtain a discharge, he is then liable on the note. *Chandler v. Winship*, 6 Mass. 310.

Mere bankruptcy, without a certificate of discharge, is no bar to an action upon a demand which was proved, and upon which the creditor received a dividend. The bankruptcy, in such a case, has the effect of a statute execution, which, like private executions, takes the property of the bankrupt toward the satisfaction of his debts without discharging them. *Lummas v. Fairfield*, 5 Mass. 249; *Pesoa v. Passmore*, 4 Yeates, 139.

A plea of an adjudication of bankruptcy is not a good defense to an action on a provable debt. *Longacre v. Myers*, 1 W. N. 109; *Ins. Co. v. Ketterlinus*, 1 W. N. 130; *Rarguel v. Gerson*, 2 W. N. 304.

**Impeaching the Discharge.**—It is competent for Congress to declare what shall be the force and effect of a discharge. *Reed v. Vaughan*, 15 Mo. 137.

If the public notice required by the act has been given, creditors must be treated as having notice of the proceedings, and can not impeach them collaterally, as they are in the nature of a proceeding in rem before a court of record having jurisdiction. *Shawhan v. Wherritt*, 7 How. 627.

When the discharge is pleaded, the court will presume that the requirements of the law in regard to notice to creditors, were complied with, and, consequently, that they were parties to the proceedings in bankruptcy. *Lathrop v. Stuart*, 5 McLean, 167.

The district court must be presumed to have proceeded regularly according to the jurisdiction granted, until the contrary appears. *Morrison v. Woolson*, 23 N. H. 11.

The discharge can not be impeached collaterally on account of defects and irregularities in the proceedings, between the petition and the discharge. *Wright v. Watkins*, 2 Greene (Iowa), 547; *Beach v. Miller*, 15 La. An. 601; *McNulty v. Frame*, 1 Sandf. 128; *Linton v. Stanton*, 4 La. An. 401; *Morrison v. Woolson*, 23 N. H. 11; *Sinclair v. Smyth*, 1 Brews. 402; *Campbell v. Perkins*, 8 N. Y. 430; s. c. 5 Barb. 609; *Morrison v. Woolson*, 29 N. H. 510; *Richards v. Nixon*, 20 Penn. 19.

The discharge is conclusive against a creditor who proved his claim, and can not be impeached by him in a collateral action. *Connor v. Gupton*, 11 Humph. 320; *Downer v. Rowell*, 25 Vt. 336; *Wales v. Lyon*, 2 Mich. 276; *Lyon v. Marshall*, 11 Barb. 241; *Humphreys v. Sweet*, 31 Me. 192. *Contra*, *Gupton v. Connor*, 11 Humph. 287.

A discharge duly granted by a district court of competent jurisdiction, can not be impeached in a collateral action because a discharge had been refused by another district court in a prior proceeding. *Morrison v. Woolson*, 23 N. H. 11.

The mere pendency of proceedings on the petition of one partner in one district, will not render a discharge void which is granted upon a subsequent petition filed by another partner in another district when that discharge is pleaded in a collateral action. *Ibid*.

If the notice required by the statute had been duly published, the discharge will bar the debt, although the name of the creditor was not placed on the schedule nor any notice given to him. *Symonds v. Barnes*, 6 B. R. 377; s. c. 59 Me. 191; *Payne v. Able*, 4 B. R. 220; s. c. 7 Bush, 344; *Randall v. Sutton*, 2 Houst. 510; *Knabe v. Hayes*, 71 N. C. 109; *Stern v. Nussbaum*, 47 How. Pr. 469; s. c. 5 Daly, 382; *In re William Archenbraun*, 11 B. R. 149; s. c. 7 C. L. N. 90; *Williams v. Butcher*, 12 B. R. 143; s. c. 22 Pitts. L. J. 141; *Blum v. Ricks*, 39 Tex. 112; *Hood v. Spencer*, 4 McLean, 168; *Pattison & Co. v. Wilbur*, 12 B. R. 193; s. c. 10 R. I. 448; *Burnside v. Brigham*, 49 Mass. 75; *Shelton v. Pease*, 10 Mo. 473; *Fox v. Paine*, 10 Ala. 523; *Brown v. Rebb*, 1 Rich. 374; s. c. 1 Strob. Ch. 206; *Strong v. Clawson*, 19 Ill. 346; *Magoon v. Warfield*, 3 Greene (Iowa), 293; *Hubbell v. Cramp*, 11 Paige, 310; *Campbell v. Perkins*, 8 N. Y. 430; s. c. 5 Barb. 690; *Mitchell v. Singletary*, 19 Ohio, 291; *Downer v. Dana*, 22 Vt.

337; *Lamb v. Brown*, 12 B. R. 522; s. c. 7 O. L. N. 363; *Platt v. Parker*, 13 B. R. 14; s. c. 11 N. Y. Supr. (Hun), 135; s. c. 6 N. Y. Supr. 377; *Thurmond v. Andrews*, 13 B. R. 157; s. c. 10 Bush, 400; *Thomas v. Jones*, 39 Wk. 124; *Heard v. Arnold*, 15 B. R. 543; s. c. 56 Ga. 570; *Jones v. Knox*, 51 Ala. 367; *Thornton v. Hogan*, 63 Mo. 143. Contra, *Morse v. Presby*, 25 N. H. 299; *Russell v. Cheatham*, 16 Miss. 703; *Barnes v. Moore*, 2 B. R. 573; s. c. 2 L. T. B. 92; *Anon.*, 1 B. R. 123; *Hill v. Robbins*, 1 Mich. (N. P.) 305; s. c. 22 Mich. 475; *Thornton v. Hogan*, 63 Mo. 163.

The notice which must be duly published in order to give the district court jurisdiction over the creditors who are not notified personally, is the notice required on the filing of the application for a discharge. *Pattison & Co. v. Wilbur*, 12 B. R. 193; s. c. 10 R. I. 448; *Thurmond v. Andrews*, 13 B. R. 157; s. c. 10 Bush, 400.

A creditor whose name was fraudulently omitted from the schedules may waive the want of notice and make himself a party to the proceedings. A creditor who applies to the district court to annul and set aside a discharge, voluntarily makes himself a party to the proceedings, and can not impeach the discharge by any other suit or proceeding. *Burpee v. Sparhawk*, 4 B. R. 685; s. c. 108 Mass. 111.

A discharge granted by a district court which has no jurisdiction over the person of the bankrupt because neither his residence nor place of business was within the district, is void. *Stiles v. Lay*, 9 Ala. 795.

Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to a hearing. Hence every system professes to summon the creditors before some tribunal to show cause against granting a discharge to the bankrupt. *Day v. Bardwell*, 3 B. R. 455; s. c. 97 Mass. 246.

A discharge granted without jurisdiction is void; for by this section it is only a discharge duly granted which is of any avail. A discharge granted without jurisdiction to grant it is not duly granted, and is no discharge. *In re Penn et al.*, 3 B. R. 582; s. c. 4 Ben. 99.

A fact which goes to defeat the jurisdiction of the court of bankruptcy may be shown by plea and proof in any court by a person not estopped to show it. *In re Goodfellow*, 3 B. R. 452; s. c. Lowell, 510; s. c. 1 L. T. B. 179; s. c. 3 L. T. B. 69.

The discharge is a bar to the action, although the particular debt upon which the suit is brought was not placed on the schedules. *Rogers v. West. Ins. Co.*, 1 La. An. 161.

The discharge can not be impeached on the ground that the bankrupt, being an alien, came to this country and took up a temporary residence for the purpose of seeking the benefit of the bankruptcy law. *Tompkins v. Bennett*, 3 Tex. 36.

**What Claims are Barred.**—The certificate of discharge is a bar only to debts and demands which were or might have been proved, but not as against personal covenants and engagements which were not provable. If a demand is not provable, it is not barred by the certificate. This is the just and settled rule. *Murray v. De Rottenham*, 6 Johns. Ch. 52.

If the debt is provable, the action is barred, although it was not actually proved. *Hardy v. Carter*, 8 Humph. 153; *Rogers v. West. Ins. Co.*, 1 La. An. 161.

The words "creditor or creditors," as used in the several provisions of the bankruptcy act, do not include the United States. *U. S. v. Herron*, 9 B. R. 535; s. c. 20 Wall. 251; s. c. 1 A. L. T. (N. S.) 274; *U. S. v. King*, Wall. Sr. 12. Contra, *U. S. v. Davis*, 3 McLean, 483; *U. S. v. Throckmorton*, 8 B. R. 309; s. c. 6 Pac. L. R. 102; s. c. 5 C. L. N. 520; s. c. 18 I. R. R. 54.

A surety for the faithful performance of the duties of a public officer is not released from his obligation by a discharge. *U. S. v. Herron*, 9 B. R. 535; s. c. 20 Wall. 251; s. c. 1 A. L. T. (N. S.) 274. Contra, *U. S. v. Throckmorton*, 8 B. R. 309; s. c. 5 C. L. N. 520; s. c. 6 Pac. L. R. 102; s. c. 18 I. R. R. 54; *U. S. v. Davis*, 3 McLean, 483.

Debts due to the United States are not within the provisions of the bankruptcy law. *U. S. v. King*, Wall. Sr. 12; *U. S. v. Rob Roy*, 13 B. R. 235; s. c. 1 Woods, 42.

A bankruptcy law will not be construed as intended to bind a State, unless the intent is manifested by express words or irresistible implication. The statute discloses no purpose on the part of Congress to bind a State. A discharge will not, therefore, release the bankrupt from a debt due to the State. *Saunders v. Comm.*, 10 Gratt. 494; *Comm. v. Hutchinson*, 10 Penn. 446.

A discharge releases a bail from his liability on a bond given to the State to secure the appearance of a person accused of a crime to answer the charge in court. *Jones v. State*, 28 Ark. 119.

If a debtor applies to take the poor debtor's oath, and charges of fraud are filed against him prior to the commencement of proceedings in bankruptcy, the certificate of discharge will not defeat or avoid the proceedings to punish him criminally for fraud upon being convicted thereof on the charges so filed. The certificate of discharge is no bar to his being sentenced and imprisoned, as prescribed by statutes, upon such conviction. *Stockwell v. Silloway*, 105 Mass. 517.

A discharge does not release the bankrupt from a fine imposed by a State court for the violation of an injunction. *Spalding v. New York*, 4 How. 21; s. c. 7 Hill, 301; s. c. 10 Paige, 284.

The discharge does not release the bankrupt from his liability for a contempt in violating an injunction. *Macey v. Jordan*, 2 Denio, 570.

If there is partnership property, a discharge in proceedings against one partner alone will not release him from liability for partnership debts. *Crompton v. Conkling*, 15 B. R. 417; 13 Pac. L. R. 205; s. c. *Hudgins v. Lane*, 11 B. R. 462.

If the bankrupt gave a deed with warranty of title when he had no deed for the land, his liability on the warranty is released by his discharge. *Williams v. Harkins*, 15 B. R. 34; s. c. 55 Ga. 172.

An action of covenant on a warranty of title is barred, although the covenant is not broken until after the discharge is granted. *Bates v. West*, 19 Ill. 134; *Shelton v. Pease*, 10 Mo. 473; *Bailey v. Moore*, 21 Ill. 165;

*Jemison v. Blowers*, 5 Barb. 686. *Contra*, *Bush v. Cooper*, 18 How. (Miss.) 82; s. c. 26 Miss. 599; *Burrus v. Wilkinson*, 31 Miss. 537; *Reed v. Pierce*, 36 Me. 455.

If a creditor received certain property as a collateral security, and held the possession thereof or of the proceeds until after the granting of the discharge, when it was taken away by a claim under a prior and paramount title, the discharge is no bar to an action on the implied warranty of title. *Bennett v. Bartlett*, 60 Mass. 225.

The claim of an indorser who pays the note after the commencement of the proceedings in bankruptcy, is barred by the discharge of the maker. *Baker v. Vasse*, 1 Cranch C. C. 193.

The certificate of discharge is a complete defense to an action by an indorser against the bankrupt, who was the acceptor of a bill of exchange, which the indorser paid after the commencement of proceedings in bankruptcy. *Hunt v. Taylor*, 4 B. R. 683; s. c. 108 Mass. 508.

A discharge will not release the bankrupt from liability to a warehouseman for storage, which accrued after the commencement of proceedings in bankruptcy. *Robinson v. Pesant*, 8 B. R. 426; s. c. 53 N. Y. 419.

If the bankrupt indorses a note between the time of the commencement of proceedings in bankruptcy and the date of his discharge, he will be liable to the holder, notwithstanding such discharge. *Sparhawk v. Broome*, 6 Binn. 256.

A promissory note for money received by the bankrupt from his wife is discharged. *Thoms v. Thoms*, 45 Miss. 263.

A debt barred by the statute of limitations is discharged. Whether a claim is provable or not is to be determined by its nature, and not by inquiring whether it is possible to establish it. Provision is made in the act itself for the exclusion of many debts and claims which are in their nature provable. The discharge is equally effectual as against such creditors to release the bankrupt as it is against any other creditor. In *re Cornwall*, 6 B. R. 305; s. c. 9 Blatch. 114; in *re Ray*, 1 B. R. 203; s. c. 2 Ben. 53; in *re Daniel P. Kingsley*, 1 B. R. 329; s. c. Lowell, 216; in *re Harden*, 1 B. R. 305; s. c. 1 L. T. B. 48; in *re L. Sheppard*, 1 B. R. 439; s. c. 1 L. T. B. 49; s. c. 7 A. L. Reg. 484.

A covenant against incumbrances is broken by the existence of an incumbrance at the time of the conveyance, and is released by a discharge. *Reed v. Pierce*, 36 Me. 455.

The discharge of the husband releases him from the debts of his wife contracted *dum sola*, and the creditors can not have her separate estate applied to the payment of their debts during his life. *Vanderheyden v. Mallory*, 1 N. Y. 452.

If a feme sole marries after the filing of a petition for a discharge, but before the granting of a discharge, a discharge granted to her in her maiden name will, on proof of identity, be a good defense to her and her husband in an action to recover a provable debt. *Chadwick v. Starrett*, 27 Me. 138.

The covenant in a deed of trust, to pay the taxes, is not a covenant to pay the debt secured by the deed, but to protect the pledge, and is a

covenant as distinct from and independent of the debt as a covenant in a mortgage against incumbrances or to insure the title. Such a covenant runs with the land. The creditor may resort to the personal covenant of the debtor for the purpose of rendering the security available. If the breach of the covenant arose after the discharge, and did not relate to any certain and specific demand capable of being proved, the covenantee is entitled to his remedy notwithstanding the certificate of discharge. *Murray v. De Rottenham*, 6 Johns. Ch. 52.

A discharge will not release the bankrupt from liability on an express covenant to pay rent where the rent fell due after the commencement of the proceedings in bankruptcy. *Large v. Bosler*, 3 Penn. L. J. 246; *Kingsley v. Prentiss*, 6 Penn. L. J. 479.

The discharge does not release the bankrupt from the rent that accrued after the commencement of the proceedings in bankruptcy and before the discharge. *Savory v. Stocking*, 58 Mass. 607; *Prentiss v. Kingsley*, 10 Penn. 120.

A discharge is no bar to an action upon a covenant in a ground rent deed for an installment that became due after the granting of the discharge. *Bosler v. Kuhn*, 8 W. & S. 183.

If the bankrupt occupies the premises after his discharge, he will be liable for the rent that accrues during such occupation. *Hendricks v. Judah*, 2 Caines, 25; *Steinmetz v. Ainslie*, 4 Denio, 573.

The grantor can not, in an action on a covenant to pay rent in a ground rent deed, obtain a judgment for the rent that fell due prior to the commencement of the proceedings in bankruptcy to be levied only upon the land, and a personal judgment against the bankrupt for the rent that fell due after that time. A single judgment can not thus consist of two parts to be enforced in different modes. *Large v. Bosler*, 3 Penn. L. J. 246.

If the original ground of action is founded in contract, but the immediate causes arise *ex delicto*, and the claim is for damages unliquidated by express agreement, or such as will not be implied, the discharge does not bar the action. *Dusar v. Murgatroyd*, 1 Wash. 13; *Hughes v. Oliver*, 8 Penn. 426.

The only rule prescribed is to practicability of proving the debt, and this can not be evaded by the form of action which the creditor may select. *Hatten v. Speyer*, 1 Johns. 37; *Campbell v. Perkins*, 8 N. Y. 430; s. c. 5 Barb. 690; *Hughes v. Oliver*, 8 Penn. 426. Contra, *Williamson v. Dickens*, 5 Ired. 259.

A person who received money prior to his bankruptcy, under a promise to put it out on bond and mortgage, and which he failed to do, is not liable after his discharge, in a special action on the case, for such neglect. *Hatten v. Speyer*, 1 Johns. 37.

A demand for damages for breach of a contract of a common carrier is barred by a discharge. *Campbell v. Perkins*, 5 Barb. 690; s. c. 8 N. Y. 430. Vide *Dusar v. Murgatroyd*, 1 Wash. 13.

A claim arising from the neglect of an officer is a tort, and is not discharged. *Ellis v. Ham*, 28 Me. 385.

A suit against an agent for a breach of duty in the management of his agency is not barred by a discharge. *Williamson v. Dickens*, 5 Irel. 259.

The discharge is not a bar to an action for deceit in falsely representing that he had confessed a judgment on a judgment note, and thereby made it a lien on his land, for the action is distinct and independent of the debt. *Hughes v. Oliver*, 8 Penn. 426.

An action by a shipper against a carrier for negligence whereby the goods of the former were injured, is not barred by a discharge. *Dusar v. Murgatroyd*, 1 Wash. 13.

No decree will be rendered in equity against a bankrupt after his discharge, for mortgaging property not his own, or for disposing of the mortgaged property prior to the commencement of the proceedings in bankruptcy. *Wolfe v. Bate*, 9 B. Mon. 208.

A discharge is no bar to an action in equity to rescind a contract on the ground of fraud. *Doggett v. Emerson*, 1 W. & M. 195; *Smith v. Babcock*, 2 W. & M. 246.

If the bankrupt as claimant signed a bond conditioned to restore the vessel if judgment should be rendered against him, a discharge will not release him from the bond, if the decision was not rendered until after the declaration of the final dividend. *U. S. v. Rob Roy*, 13 B. R. 235; s. c. 1 Woods, 42.

When the evidence does not show when the final dividend was made, the discharge will only be deemed to operate on claims which were liquidated or fixed at the time of the commencement of the proceedings in bankruptcy. *Ibid.*

A discharge of the bankrupt does not prevent the assignee from recovering property that belonged to his estate, although it was not placed on his schedules. *Maybin v. Raymond*, 15 B. R. 353; s. c. 4 A. L. J. (N. S.) 21.

If the bankrupt waives the benefit of his discharge and permits judgment to be entered against him, a fraudulent grantee can not object that the defense was not made. *Dewey v. Moyer*, 16 B. R. 1; s. c. 16 N. Y. Supr. 473.

**Sureties.**—The surety on a custom-house bond, in case of the discharge of the principal in bankruptcy, is, like other creditors, barred of his action for a debt due before the bankruptcy. *Reed v. Emory*, 1 S. & R. 339; *Kerr v. Hamilton*, 1 Cranch C. C. 546.

A surety who has paid a duty bond has not the right of the United States to proceed against the person of the bankrupt, but only against his effects, and the claim is barred. *Kerr v. Hamilton*, 1 Cranch C. C. 546.

The discharge does not extend to contracts upon which no claim could be founded at the time of the commencement of the proceedings in bankruptcy, and in regard to which there was then no reason to presume that any demand for money would ever exist. The discharge does not release a surety from liability on a bond given by an officer for the faithful performance of his duties, where the breach occurred after the dis-



charge was granted. *Loring v. Kendall*, 67 Mass. 305; *Fowler v. Kendall*, 44 Me. 448.

A discharge does not release a bankrupt from his liability as surety on an injunction bond, when the proceedings in which the injunction was issued are not determined until after the granting thereof. *Eastman v. Hibbard*, 13 B. R. 360; s. c. 54 N. H. 504.

A bond to secure the faithful performance of official duties is a continuing indemnity, and every breach of it is a good cause of action, affording a remedy when, and only when, each severally occurs. A discharge releases the surety for all breaches that occurred prior to the commencement of the proceedings in bankruptcy. *Fowler v. Kendall*, 44 Me. 448.

A discharge does not release the bankrupt from his liability to his surety on a delivery bond if he pays the amount for which he is liable after the commencement of the proceedings in bankruptcy, although the breach occurred before that time. *Pogue v. Joyner*, 6 Ark. 241.

The claim of a surety upon an official bond, arising from the neglect of the officer, is not barred by a discharge. *Ellis v. Ham*, 28 Me. 385.

If a judgment is rendered against the principal and the surety after the commencement of proceedings in bankruptcy, but before the granting of a discharge to the principal, the surety on paying the judgment will have a claim against the principal. *Pike v. McDonald*, 32 Me. 418.

The discharge releases the bankrupt from his liability to a surety upon his note or bond, although some of the installments fell due and were paid by the surety after the granting of the discharge. *Fullwood v. Bushfield*, 14 Penn. 90.

A surety can not recover against a principal who has been discharged in bankruptcy, upon payment of an obligation for which the bankrupt was liable before his discharge. His claim is contingent, and may be proved. *Lipscomb v. Grace*, 28 Ark. 231; *Mace v. Wells*, 7 How. 272; s. c. 17 Vt. 503. Contra, *Greenleaf v. Maher*, 2 Wash. 44.

The discharge does not release the bankrupt from his liability to a surety for money paid on a judgment rendered against them both after the granting of the discharge. *Leighton v. Atkins*, 35 Me. 118.

The claim of a surety on a replevin bond against his cosurety for contribution is barred, although judgment is not rendered in the replevin suit until after the discharge is granted. *Tobias v. Rogers*, 13 N. Y. 59.

The discontinuance of a suit by the obligee in an official bond against the surety, upon a plea of the discharge, does not relieve him from liability for contribution to his cosurety. *Dole v. Warren*, 32 Me. 94.

**Judgments.**—A demand *ex delicto* is not discharged unless a judgment was obtained upon it before the commencement of the proceedings in bankruptcy, thereby changing its character from tort to debt. *Ellis v. Ham*, 28 Me. 385; *Crouch v. Gridley*, 6 Hill, 250; *Kellogg v. Schuyler*, 2 Denio, 73.

A discharge releases the bankrupt from all judgments rendered against him prior to the commencement of the proceedings in bankruptcy, for a judgment is a debt of record. *Blake v. Bigelow*, 5 Ga. 437.

A judgment of separation of property is released by a discharge. *Alling v. Egan*, 11 Rob. (La.) 244.

A judgment in an action in tort is barred by a discharge. *Comstock v. Grout*, 17 Vt. 512; *in re Edson Comstock*, 22 Vt. 642.

A judgment obtained upon a breach of promise to marry is barred. *In re Sidle*, 2 B. R. 220.

A judgment in an action for seduction, rendered prior to the commencement of the proceedings in bankruptcy, is not barred. *In re Samuel S. Cotton*, 2 N. Y. Leg. Obs. 370; *Nassau v. Parker*, 2 Penn. L. J. 298.

The discharge does not release the bankrupt from a decree for the maintenance of a bastard child. The character of the claim partakes of the nature of a penalty and police regulation for the enforcement of a moral and natural duty, resulting from a wrongful and criminal act, and has nothing of the character of a debt except the duty to pay money to another. *Comm. v. Erisman*, 21 Pitts. L. J. 69; *in re Samuel S. Cotton*, 2 N. Y. Leg. Obs. 370.

Where a decree directs the payment of a certain sum every month as alimony, the monthly payments which fall due after the commencement of the proceedings in bankruptcy are due by natural obligation and not by contract, and are not affected by a discharge. *In re Edward Garrett*, 11 B. R. 493.

The certificate of discharge is no bar to a judgment for a prior debt obtained after the granting thereof. *Selfridge v. Lithgow*, 2 Mass. 374.

The discharge may be pleaded to a sci. fa. to revive a judgment. *Duncan v. Hargrove*, 22 Ala. 150; *Alter v. Nelson*, 27 La. An. 242.

The discharge is no defense to a sci. fa. to revive a judgment of revival entered after the granting of a discharge. *Stewart v. Colwell*, 24 Penn. 67.

A judgment entered after the commencement of the proceedings in bankruptcy in an action in tort is not barred by a discharge, although the verdict was rendered before that time. *Kellogg v. Schuyler*, 2 Denio. 73.

If a verdict in an action for a tort is rendered before the commencement of the proceedings in bankruptcy, and the entry of a judgment is suspended by a motion for a new trial, and is not made until after the granting of a discharge, the judgment is not barred. *Nassau v. Parker*, 2 Penn. L. J. 298.

The report of referees is equivalent to the verdict of a jury. Although the report liquidates the damages, it does not change the nature of the demand. That remains the same until it is extinguished by the judgment, and if that is entered after the commencement of the proceedings in bankruptcy the claim for the tort is not barred by a discharge. *Crouch v. Gridley*, 6 Hill. 250.

An agreement among the referees as to the amount of the damages, without a report, does not change the nature of the demand. So long as the report remains incomplete there is nothing but the original tort. *Ibid.*

If a judgment by default is entered before the granting of a discharge in an action pending at the time of the commencement of the proceedings in bankruptcy, and a final judgment entered after the granting of the discharge, the discharge is not a bar to the demand, for the bankrupt was not bound to submit to the discretion of the court by applying to have the default set aside. *Ewing v. Peck*, 17 Ala. 339.

The discharge does not release the bankrupt from a judgment entered up after the granting of a discharge in an action pending at the time of the commencement of the proceedings in bankruptcy, and in which a default was entered before the discharge was granted. *Hollister v. Abbot*, 31 N. H. 442.

A judgment entered after the filing of the petition in bankruptcy upon a decision rendered prior thereto is released by the discharge. *Monroe v. Upton*, 6 Lans. 255; s. c. 50 N. Y. 593.

The discharge is not a bar to the bankrupt's liability for costs of a suit pending in his name at the time of the commencement of the proceedings in bankruptcy, and subsequently prosecuted in his name. *Bridges v. Armour*, 5 How. 91.

If the bankrupt was plaintiff in an action pending at the time of the commencement of proceedings in bankruptcy, and made no objection at the time of the entry of a judgment against him for costs on his failure to sustain his suit, his discharge will not release him from such judgment. *Wilkins v. Warren*, 27 Me. 438.

If the bankrupt's partner institutes a suit in the name of the firm after the commencement of proceedings in bankruptcy to collect a debt due to the firm, the discharge will not release the bankrupt from a judgment for costs entered after the granting thereof. *Ward v. Barber*, 1 E. D. Smith, 423.

The costs which accrue after the commencement of the proceedings in bankruptcy rest upon the original debt, and a plea *pluis darrein* continuance operates as a discharge of the action for the costs as well as the debt. *Harrington v. McNaughton*, 20 Vt. 293; *Clark v. Rowling*, 3 N. Y. 216.

The discharge releases the bankrupt from all liability for costs in an action pending in his name at the time of the commencement of the proceedings in bankruptcy, although the suit was prosecuted by him after that time and dismissed after the granting of his discharge. *Leavitt v. Baldwin*, 4 Edw. Ch. 289.

The discharge releases the bankrupt from a judgment for a provable debt entered after the commencement of the proceedings in bankruptcy and before the granting of a discharge. *Harrington v. McNaughton*, 20 Vt. 293; *Dresser v. Brooks*, 3 Barb. 429; *Johnson v. Fitzhugh*, 3 Barb. Ch. 360; *McDonald v. Ingraham*, 30 Miss. 389; *Clark v. Rowling*, 3 N. Y. 216; *Rogers v. West. Ins. Co.*, 1 La. An. 161; *Fox v. Woodruff*, 9 Barb. 498; *Dick v. Powell*, 2 Swan, 632; *Downer v. Rowell*, 26 Vt. 397. Contra, *Bradford v. Rice*, 102 Mass. 472; *Ellis v. Ham*, 28 Me. 385; *Thompson v. Hewitt*, 6 Hill, 254; *Kellogg v. Schuyler*, 2 Denio, 73; *Woodbury v.*

**Perkins**, 59 Mass. 86; **Holbrook v. Foss**, 27 Me. 441; **Uran v. Houdlette**, 31 Me. 15; **Pike v. McDonald**, 32 Me. 418; **Ingersoll v. Rhoades**, Hill & D. Sup. 371; **Fisher v. Foss**, 30 Me. 459; **Roden v. Jaco**, 17 Ala. 344.

A discharge is no bar to an action on a judgment rendered in another State after the granting of the discharge, if it would not be a bar to a similar action upon a judgment rendered in the State. **Rees v. Butler**, 18 Mo. 173.

When an action is brought in another State on a judgment rendered after the commencement of the proceedings in bankruptcy, but before the granting of a discharge, it will be deemed to be barred by the discharge if it would be barred by the laws of the State where the judgment was rendered. **Haggerty v. Amory**, 89 Mass. 458.

If the jurisdiction of the district court over the person of the debtor is shown, it will be presumed that the notices to the creditors have been regularly given until the contrary appears. **Morse v. Presby**, 25 N. H. 290; **Rucknam v. Cowell**, 1 N. Y. 505; **Norris v. Goss**, 2 Spear. 80.

**Remedies against Judgments.**—A judgment will be set aside for the purpose of letting the bankrupt plead his discharge when it appears to have been entered without his knowledge or acquiescence, or under such circumstances as would induce a court to open a judgment, when it is clear that the defendant has a valid defense. **Comm. v. Huber**, 5 Penn. L. J. 331.

If a judgment for a deficiency is entered against a bankrupt in a proceeding to foreclose a mortgage, he may move to set it aside as soon as he learns what has taken place, and then plead his discharge. **Mutual Life Ins. Co. v. Cameron**, 1 Abb. N. C. 424.

If application is seasonably made, a judgment by default will be stricken off upon terms to allow a party to plead his discharge in bar to the further maintenance of the suit. The bankruptcy law is to be treated with the same respect as if it were a statute of the State. **Savings Bank v. Webster**, 48 N. H. 21; **Lee v. Phillips**, 6 Hill, 246; **Carter v. Goodrich**, 1 How. Pr. 239.

If the bankrupt's attorney fails by mistake to appear and plead his discharge, and judgment is entered by default, a review may be granted. **Shurtleff v. Thompson**, 12 B. R. 524; s. c. 63 Me. 118.

The bankrupt may be required to pay costs before the judgment will be set aside. **Lee v. Phillips**, 6 Hill, 246.

If he omits to plead his discharge when he has the opportunity, the court will not relieve him on motion. **Rudge v. Rundle**, 1 N. Y. Supr. 649.

The plea of bankruptcy is not a privileged plea, nor is it regarded with such favor that, under the rules of common-law practice and pleading, a default will be open to let in the plea. **Park v. Casey**, 35 Tex. 536.

A new trial will not be granted if the bankrupt has been guilty of laches in pleading his discharge. **Manwarring v. Kouns**, 35 Tex. 171; **Park v. Casey**, 35 Tex. 536.

A judgment obtained against a discharged bankrupt in a pending action under circumstances going to show fraud, trick, or contrivance, may be enjoined. *Ibid.*

If the bankrupt at the time of the rendition of the judgment against him is in attendance upon the court as a grand jurymen, this is good ground for enjoining the judgment. It is error not to cause him to be called before entering a judgment by default against him. *Manwarring v. Kouns*, 35 Tex. 171.

If the judgment is set aside to permit the defendant to plead a discharge, the plaintiff may discontinue without costs. *Lee v. Phillips*, 6 Hill, 246.

When a judgment is set aside by the granting of a new trial, the defendant may plead a discharge obtained since the rendition of the judgment. The court can not render a judgment against the defendant in the face of his discharge, nor in his favor upon any plea of set-off, as that belongs to his assignee. The suit may be dismissed without prejudice, leaving the parties to their remedies under the bankruptcy law. *Humble v. Carson*, 6 B. R. 84.

The defendant can not move to have his discharge entered of record for the purpose of preventing the issuing of an execution before one is sued out, for that would enable him to become the actor while the creditor is passive. *Brown v. Branch Bank*, 20 Ala. 420.

An execution should not issue upon a judgment after the debtor has obtained a discharge, without an order of the court allowing it made upon notice to the bankrupt of the motion for such order. *Francis v. Ogden*, 22 N. J. 210; *Alcott v. Avery*, 1 Barb. Ch. 347.

If execution is issued upon a judgment which is released by the discharge, it will be set aside, on motion, and a perpetual stay entered. *Huber v. Ely*, 4 A. L. J. 185; *Monroe v. Upton*, 6 Lans. 255; s. c. 50 N. Y. 593; *Thomas v. Shaw*, 2 Cin. 97; *Graham v. Pierson*, 6 Hill, 247; *McDougald v. Reid*, 5 Ala. 810; *Stewart v. Hargrove*, 23 Ala. 429; *Alcott v. Avery*, 1 Barb. Ch. 347; *Curtis v. Slosson*, 6 Penn. 265; *Chambers v. Neale*, 13 B. Mon. 256; *Milbous v. Alcardi*, 51 Ala. 594.

When the discharge is granted, an execution levied prior to that time upon property of the bankrupt acquired subsequently to the filing of the petition in bankruptcy, will be set aside, although the judgment creditor did not prove his debt. *Bank v. Franciscus*, 10 Mo. 27.

A perpetual stay of execution will be granted where a verdict was rendered before the commencement of the proceedings in bankruptcy, but the entry of the judgment was suspended by a motion for a new trial, but finally made before the granting of the discharge. *Mechanics' Bank v. Lawrence*, 1 Sandf. 659.

A perpetual stay will not be granted where the judgment was entered after the commencement of the proceedings in bankruptcy, under an agreement that it should not be affected by any discharge that might be obtained. *Thompson v. Hewitt*, 6 Hill, 254.

A perpetual stay of execution is never granted where the defendant might have pleaded his discharge. *Lee v. Phillips*, 6 Hill, 246.

On motion for a perpetual stay of execution, the discharge may be proved by a copy. *Thompson v. Hewitt*, 6 Hill, 254.

As the creditor is entitled to appear and oppose, the motion will only be granted upon the payment of the costs of opposing. *Huber v. Ely*, 4 A. L. J. 185; *Mechanics' Bank v. Lawrence*, 1 Sandf. 659.

Whether the property which is taken on the execution was fraudulently transferred to another prior to the commencement of the proceedings in bankruptcy, is a question which will not be tried on motion to set aside the levy. *Thomas v. Shaw*, 2 Cin. 97.

A court of equity has no more right to interfere to annul a judgment rendered after the bankrupt had an opportunity to plead his discharge, in order to give effect to the discharge, than it has to set aside a judgment in favor of any other defense. *Bellamy v. Woodson*, 4 Ga. 175; *Stewart v. Green*, 11 Paige, 535; *Goodrich v. Hunton*, 2 Woods, 137.

The mere postponement of a cause from term to term, until the defendant obtains his discharge, and the taking of a judgment at that time, do not constitute a fraud in the obtaining of the judgment, or entitle the defendant to relief in equity. *Bellamy v. Woodson*, 4 Ga. 175.

Where a judgment by default was rendered against the bankrupt prior to the commencement of the proceedings in bankruptcy, and the case then continued from term to term, until a discharge was granted, his negligence in omitting to plead his discharge will prevent him from obtaining relief in equity against a final judgment subsequently rendered against him. *Bellamy v. Woodson*, 4 Ga. 175.

A discharge extinguishes a judgment which existed before the commencement of proceedings in bankruptcy, and all proceedings on a fieri facias issued thereon are irregular and illegal, and may be enjoined. *Murphy v. Smith*, 22 La. An. 441.

If the goods of a bankrupt are seized under a fieri facias issued upon a judgment in respect of a debt due before the bankruptcy, the court, on motion, will set aside the execution. The remedy is in the court out of which the execution issued, by a summary application, when the discharge operates upon the judgment. The court will not set aside the execution without giving the execution creditor an opportunity to show that the discharge is inoperative as against his debt, and, when necessary, will direct an issue to try the fact. The creditor may resist the application on any of the grounds which except his debt from the effect of the discharge, and the court will determine the question on affidavits in a summary manner, or will grant an issue in its discretion. *Linn v. Hamilton*, 34 N. J. L. 305.

When the execution is regular upon its face, and is issued by the proper authority, and executed by the officer to whom it is directed, the judgment debtor can not recover the possession of the property by an action of replevin, even though he may, after the rendition of the judgment and before the issue of the execution, have obtained a discharge in bankruptcy. *Westenberger v. Wheaton*, 8 Kans. 169.

The district court has no jurisdiction to enjoin a creditor who has caused an execution to be issued on a judgment rendered after the commencement of proceedings in bankruptcy. The jurisdiction of the bank-

ruptcy court ceases with the granting of the discharge. *Penny v. Taylor*, 10 B. R. 200.

If a discharge is valid, it extinguishes a prior judgment, and an execution thereon, though it may be a protection to the officer who makes the levy, can not justify the party at whose instance it issues. He acts at his peril. Although he is ignorant of the discharge, yet, if he takes the bankrupt's property without authority, it is a trespass for which he must answer, however innocent he may be of any intention to do an illegal act. *Rucknam v. Cowell*, 1 N. Y. 505.

A judgment creditor may issue an execution on his judgment, and the execution is not absolutely void but voidable duly; that is, it is a valid writ until the bankrupt shows it to be erroneous. The execution will afford protection to the party issuing it until it is set aside. *Cogburn v. Spence*, 15 Ala. 549; *Roden v. Jaco*, 17 Ala. 344.

When the bankrupt has caused the execution to be set aside, then the party issuing the process is responsible for all the injury resulting to the bankrupt from the execution. *Cogburn v. Spence*, 15 Ala. 549.

**Alien Creditors.**—A discharge in bankruptcy bars a foreign as well as a domestic creditor. There is no need of an express declaration of the legislature that foreign creditors are included in the operation of the bankruptcy law when the language of the statute is otherwise sufficiently general and comprehensive, and when the evident policy of the law is to embrace all debts that can be proved, and to give the unfortunate merchant who conducts himself fairly, new credit in the commercial world and new capacity for business. *Murray v. De Rottenham*, 6 Johns. Ch. 52; *in re Augustus Zarega*, 1 N. Y. Leg. Obs. 40; s. c. 4 Law Rep. 480; *Pattison & Co. v. Wilbur*, 12 B. R. 193; s. c. 10 R. I. 448. *Contra, Lizardi v. Cohen*, 3 Gill. 430; *McMenomy v. Murray*, 3 Johns. Ch. 435.

**Liens.**—In order to give full effect to all the provisions of the act, the bankrupt's certificate must be made to operate as a discharge of his person and future acquisitions, while, at the same time, mortgagees and other lien creditors are permitted to have their satisfaction out of the property mortgaged or subject to lien. *Peck v. Jenness*, 7 How. 612.

If a vendee who has taken a bond of conveyance sells the land to another who agrees to pay the consideration, a discharge will release the vendee from personal liability but will not affect the vendor's lien or the rights of the purchaser. *Lewis v. Hawkins*, 23 Wall. 119.

If a vendee sold the land before the commencement of the proceedings in bankruptcy, his discharge will not prevent the entry of a judgment in rem to enforce the vendor's lien. *Elliott v. Booth*, 44 Tex. 180.

A discharge will not prevent the entry of a judgment in rem to enforce a vendor's lien. *Boone v. Revis*, 44 Tex. 384.

A bill to enforce vendor's lien can not be enforced against bankrupts. *Pearce v. Foreman*, 29 Ark. 563.

The certificate of discharge does not prevent those entitled from recovering any specific property held by the bankrupt in a fiduciary capacity. *Waller v. Edwards*, 6 Litt. 348.

The discharge operates to bar actions for the recovery of debts only, and can not be pleaded to a summary process in the nature of a possessory action to recover the possession of land. *Crosby v. Wentworth*, 48 Mass. 10; *Lomax v. Spear*, 51 Ala. 532.

The discharge of the tenant will not prevent the landlord from recovering in an action of replevin instituted prior to the commencement of the proceedings in bankruptcy to recover property taken as distress for rent. *Butler v. Morgan*, 8 W. & S. 53.

The discharge can not be pleaded to a *sci. fa.* to enforce a mechanic's lien, for the proceeding is strictly in *rem*. *McCullough v. Caldwell*, 5 Ark. 237.

The discharge does not affect the lien of a judgment. *McCance v. Taylor*, 10 Gratt. 580; *Heard v. Patton*, 27 La. An. 542.

If the judgment proposed to be revived is a lien on land, the revival may be limited to a sale of the land, leaving the discharge to operate as an absolution of the personal obligation. *Reed v. Bullington*, 11 B. R. 408; s. c. 49 Miss. 223.

If an action of covenant is brought against the bankrupt on an express covenant in a ground rent deed, for rent that fell due prior to the commencement of the proceedings in bankruptcy, a restricted judgment may be entered, to be levied only on the land out of which the ground rent issues, for the rent is a lien on the land. *Large v. Bosler*, 3 Penn. L. J. 246.

When an attachment has been laid upon the property of the bankrupt prior to the period of four months next preceding the commencement of proceedings in bankruptcy, a judgment may be entered in the court in which such attachment is pending, to be enforced against the property attached, and not to be enforced against the person of the bankrupt, even though the discharge is pleaded in bar of the further maintenance of the attachment suit. *Bates v. Tappan*, 3 B. R. 647; s. c. 99 Mass. 376; *Bowman v. Harding*, 4 B. R. 20; s. c. 56 Me. 559; *Leighton v. Kelsey*, 4 B. R. 471; s. c. 57 Me. 85; *Ingraham v. Phillips*, 1 Day. 117.

A party having a judgment lien upon property conveyed by the bankrupt, before the filing of his petition to another, may enforce it by a *fi. fa.*, even after a discharge has been granted, when neither the judgment nor the property has ever been before the bankruptcy court for adjudication. *Jones v. Lellyett*, 39 Ga. 64. *Contra*, *Blum v. Ellis*, 13 B. R. 345; s. c. 73 N. C. 293.

A judgment which is a lien upon property sold by the bankrupt before the commencement of the proceedings in bankruptcy may be enforced against such property after the granting of the discharge, although it was proved against the bankrupt's estate, if such proof was subsequently withdrawn under a special order of the bankruptcy court. *Phillips v. Boydoin*, 14 B. R. 43; s. c. 52 Ga. 544.

A judgment creditor may enforce his lien against land sold by the bankrupt before the commencement of the proceedings in bankruptcy, although he abandoned a levy made upon personal property by permitting it to go back into the hands of the defendant, and did not follow it into



the hands of the assignee. *Winship v. Phillips*, 14 B. R. 50; s. c. 52 Ga. 593.

A party who has a lien upon property fraudulently conveyed away by the bankrupt may prosecute a suit to enforce it, instituted before the commencement of proceedings in bankruptcy, even though the discharge is pleaded in bar of the suit. *Payne v. Able*, 4 B. R. 220; s. c. 7 Bush, 344; *Fetter v. Cirode*, 4 B. Mon. 482; *Lowry v. Morrison*, 11 Paige, 327.

In such a case the proper course for the bankrupt is to apply for an order that the complainant proceed, and bring the assignee before the court by a supplemental bill in the nature of a bill of revivor. The bankrupt may then by plea or answer set up his discharge in bar of the suit so far as he is continued a party to the same by such supplemental bill. *Lowry v. Morrison*, 11 Paige, 327.

A discharge in bankruptcy constitutes no defense to an action to foreclose a mortgage. But no judgment can be rendered against the bankrupt for any deficiency. This applies to a mortgage of personal as well as real property. *Pierce v. Wilcox*, 40 Ind. 70; *Truitt v. Truitt*, 38 Ind. 16; *City Bank v. Walton*, 5 Rob. (La.) 158; *Stewart v. Anderson*, 10 Ala. 504; *Second National Bank v. State National Bank*, 11 B. R. 49; s. c. 10 Bush, 367; *Roberts v. Woods*, 38 Wis. 60; *Carlisle v. Wilkins*, 51 Ala. 371.

When the bankrupt has received a discharge, he may apply to the State court for an erasure of the conventional and judicial mortgages. *Diggs v. Prieur*, 11 Rob. (La.) 54.

A creditor can not file a bill in equity to set aside a fraudulent conveyance after a discharge has been granted, for the debt is thereby discharged. *Botts v. Patton*, 10 B. Mon. 452.

A bill of equity, to reach the property of the bankrupt, can not be further proceeded in against the bankrupt himself after the granting of a discharge. *Penniman v. Norton*, 1 Barb. Ch. 246.

The commencement and pendency of proceedings in bankruptcy is no matter in bar of a creditor's suit, as the bankrupt may fail in his effort to obtain a discharge. *Dick v. Powell*, 2 Swan, 632; *Ingalls v. Savage*, 4 Penn. 224.

If the assignee repudiates a particular piece of property because it is so hedged about with difficulty and embarrassments as to render it doubtful whether it would be profitable to endeavor to acquire it, a creditor may subject it to the payment of his claim, although the bankrupt has obtained his discharge. *Rugely v. Robinson*, 19 Ala. 404.

If a party who has taken the benefit of a State insolvent law under a statute which gives the trustee or the creditors a right to claim future acquisitions, subsequently takes the benefit of the bankruptcy law, his discharge will release his future acquisitions from the claims of those creditors whose debts existed prior to the filing of his petition. *Beach v. Miller*, 15 La. An. 601.

If a debtor who has obtained a discharge under a State insolvent law, subsequently obtains a discharge under the bankruptcy law, the discharge in bankruptcy will not affect the right of the insolvent trustee to property acquired by inheritance after the granting thereof. *Lavender v. Gosnell*, 12 B. R. 282; s. c. 43 Md. 153.

If a surety enters into a covenant to pay the amount that may be recovered against the principal in a certain action, and the principal subsequently becomes bankrupt, the court may allow the suit to be prosecuted to judgment upon the entry on the docket by the plaintiff, of a stipulation that such judgment shall not affect the defendant's property as a lien, or be the ground of an execution against him, and the sum so ascertained may be recovered from the surety upon the covenant. *Bond v. Gardner*, 4 Binn. 268.

Although the bankrupt personally is released, yet the debt due from the land remains undischarged, and he does not derive from the statute any power to do or assert anything which will impair a mortgage otherwise valid. His personal discharge does not free him from an estoppel arising from a covenant in the mortgage. If the mortgage contains a covenant against incumbrances, the debtor is estopped from setting up a title acquired after his discharge under a lien existing prior to the mortgage. *Bush v. Cooper*, 18 How. (Miss.) 82; s. c. 26 Miss. 590; *Stewart v. Anderson*, 10 Ala. 504.

A discharge under the bankruptcy law does not prevent the creditor from proving his debt in a proceeding previously commenced under a State insolvent law, and receiving a dividend from the insolvent estate. *Minot v. Thacher*, 48 Mass. 348.

As a discharge extinguishes the debts, the trust under an assignment for the benefit of creditors is thereby terminated unless it is made to appear that the debts survive the discharge and are to be paid out of the assigned property. *Seymour v. Street*, 5 Neb. 85.

**New Promise.**—There is no law that requires a promise to pay a debt discharged by proceedings in bankruptcy, to be made in writing to be valid. Therefore such a promise may be proved by parol, and when proved is binding. *Barron v. Benedict*, 44 Vt. 518; *Hill v. Robbins*, 21 Mich. 475; s. c. 1 Mich. N. P. 305; *Apperson v. Stuart*, 27 Ark. 619; *Healy v. Lanier*, 15 B. R. 280; s. c. 75 N. C. 172.

If a bankrupt promise to pay the debt in consideration of an agreement on the part of the debtor to take no dividend from the estate, the promise is binding if everything is fair. *Kingston v. Wharton*, 2 S. & R. 208.

The legal obligation of the bankrupt is by force of positive law discharged, and the remedy of the creditor existing at the time the discharge was granted, to recover his debt by suit, is barred. But the debt is not paid by the discharge. The moral obligation of the bankrupt to pay it remains. It is due in conscience, although discharged in law, and this moral obligation, uniting with a subsequent promise by the bankrupt to pay the debt, gives a right of action. *Dusenberry v. Hoyt*, 10 B. R. 313; s. c. 53 N. Y. 521; s. c. 14 Abb. Pr. (N. S.) 132; s. c. 36 N. Y. Supr. 94; *Yates v. Hollingsworth*, 5 H. & J. 216; *Maxim v. Morse*, 8 Mass. 127; *Stewart v. Reckless*, 24 N. J. 127; *Spooner v. Russell*, 30 Me. 454; *Williams v. Robbins*, 32 Me. 181; *Fletcher v. Neally*, 20 N. H. 464; *Herndon v. Givens*, 16 Ala. 261; *Blane v. Banks*, 10 Rob. (La.) 115.

The promise by which a discharged debt is revived must be clear, distinct, and unequivocal. There must be an expression by the debtor of a

clear intention to bind himself to the payment of the debt. *Allen v. Ferguson*, 9 B. R. 481; s. c. 18 Wall. 1; *Fraley v. Kelly*, 67 N. C. 78; *Linton v. Stanton*, 4 La. An. 401; *Branch Bank v. Boykin*, 9 Ala. 320; in re *Hazleton*, 32 Leg. Int. 13.

The new promise must be distinct, unambiguous and certain. *Stern v. Nussbaum*, 47 How. Pr. 489; s. c. 5 Daly, 382.

The promise must be express in contradistinction to a promise implied from an acknowledgment of the justness or existence of the debt. *Yoxthelmer v. Keyser*, 11 Penn. 364; *Pratt v. Russell*, 61 Mass. 462; *Bennett v. Everett*, 3 R. I. 152; *Horner v. Speed*, 2 Pat. & H. 616; *Porter v. Porter*, 31 Me. 169.

The expression of an intention to pay the debt is not sufficient. There must be a promise before the debtor is bound. An intention is but the purpose a man forms in his own mind; a promise is an express undertaking or agreement to carry that purpose into effect. *Allen v. Ferguson*, 9 B. R. 481; s. c. 18 Wall. 1; *Dearing v. Moffitt*, 6 Ala. 776; *Stewart v. Reckless*, 24 N. J. 427; *Church v. Winkley*, 73 Mass. 460; *Yoxthelmer v. Keyser*, 11 Penn. 364.

The expression of an intention to do right is not sufficient to revive the debt, for what may be right depends on many circumstances. The principle is impracticable as a rule of action to be administered by the courts. *Allen v. Ferguson*, 9 B. R. 481; s. c. 18 Wall. 1.

There is no precise form of words required. The true test is, did the party mean that he would pay the amount of the debt? If he did, and the words used by him were susceptible of no other construction, then they amount in law to an express promise. *Evans v. Carey*, 29 Ala. 99; *Bennett v. Everett*, 3 R. I. 152.

A declaration that he expects to pay as fast as he can pay in money is the expression of a mere hope, without any words of promise or manifestation of the intent to contract an obligation. *Bartlett v. Peck*, 5 La. An. 669.

If the words spoken amount to nothing more than loose declarations or mere admission, or the mere expression of the obligation in foro conscientiae, they are insufficient. *Bartlett v. Peck*, 5 La. An. 669; *Frewett v. Caruthers*, 20 Miss. 491; *Bennett v. Everett*, 3 R. I. 152.

A declaration that he is able and willing to pay the debt amounts to an express promise to pay. *Evans v. Carey*, 29 Ala. 99.

As a promise is merely evidence of the determination of the mind to do a particular act, there is no reasonable distinction between "I will pay" and "I intend to pay," on the happening of a particular event. *Dearing v. Moffitt*, 6 Ala. 776.

To prove a new promise it is not necessary to show that the word "promise" was used. An agreement to pay, or any word signifying an intent to pay, or giving assurance that he would pay, is sufficient evidence of a new promise. *Harris v. Peck*, 1 R. I. 262.

The bankrupt is at liberty to make the proposition in such manner as suits his own purposes, and the promise must be taken as it is made. If he promises to pay the debt by giving a new note, this can not be con-

strued as a promise to pay the prior note. The promise is to make at a future time a written agreement to pay the debt, and his liability is not fixed until the new note is given. *Porter v. Porter*, 31 Me. 169.

A refusal to give a new note is not inconsistent with an express promise to pay the existing note. *Underwood v. Eastman*, 18 N. H. 582; *Pratt v. Russell*, 61 Mass. 462. Vide *Horner v. Speed*, 2 Pat. & H. 616.

Partial payments on a debt are not in law a new promise to pay the debt, nor do they constitute evidence from which a jury may infer a new promise to pay the debt. *Stark v. Stinson*, 23 N. H. 259; *Viele v. Ogilvie*, 2 Greene, 326.

The mere payment of the interest on the note does not revive the debt. *Cambridge Institution v. Littlefield*, 60 Mass. 210.

A promise to settle a demand which is justly due, and wholly unpaid, can mean nothing less than that it shall be paid. *Stillwell v. Coope*, 4 Denio, 225.

The new promise, like every other contract, must have the assent of both parties. *Samuel v. Cravens*, 10 Ark. 380.

The fact that no time was fixed when the payment was to be made does not affect the force of the legal obligation, for the law itself will fix the time. *Harris v. Peck*, 1 R. I. 262.

It is not necessary that the new promise shall be made by the bankrupt to the creditor or his authorized agent. It may be made to a third person. *Haines v. Stauffer*, 13 Penn. 541; *McKinley v. O'Keson*, 5 Penn. 369; *Evans v. Carey*, 29 Ala. 99; *Bennett v. Everett*, 3 R. I. 152; *Comfort v. Eisenbeis*, 11 Penn. 13. Contra, *Underwood v. Eastman*, 18 N. H. 582.

In determining whether the words amount to an express promise, the fact that they were spoken to a third person, and not to the creditor nor his agent, may be taken into consideration with the other facts in evidence, for the sense of the words may best appear from them, and the cause and occasion of speaking them considered together. *Evans v. Carey*, 29 Ala. 99; *Prewett v. Caruthers*, 20 Miss. 491; *Horner v. Speed*, 2 Pat. & H. 616.

A request made by the bankrupt to a third party, out of the presence of the creditor, to indorse a note for the amount which he owed the creditor, does not raise a presumption of a promise to pay the debt. *Bach v. Cohn*, 3 La. An. 101.

The new promise must be an express promise, and must be absolute and unconditional. If there is anything like a condition in the promise, it must be removed by testimony, and placed on the footing of an absolute undertaking, to entitle the creditor to a recovery. As if the bankrupt should say that he would pay when he was able, the creditor must show an ability to pay. *Yates v. Hollingsworth*, 5 H. & J. 216; *Brown v. Collier*, 8 Humph. 510; *Mason v. Hughart*, 9 B. Mon. 480; *La Tourrette v. Price*, 28 Miss. 702; *Samuel v. Cravens*, 10 Ark. 380; *Sherman v. Hobart*, 26 Vt. 60; *Taylor v. Nixon*, 4 Sneed, 352; *Ingersoll v. Rhoades*, Hill & D. Supp. 371; *Apperson v. Stuart*, 27 Ark. 619.

The ability to pay must be clearly proven. The mere opinion of witnesses that a party has means sufficient wherewith to discharge the debt

can not be regarded as sufficient evidence. The jury should be fully satisfied, by facts proved to exist, that the debtor has property and means which enable him to pay. *Mason v. Hughart*, 9 B. Mon. 480.

If the promise is to pay when he is able, the debtor may defeat the prima facie right established through proof that he owns property, by showing that the payment of debts contracted honestly and in the ordinary course of his business, subsequent to his discharge will exhaust his estate. *Ecklar v. Galbraith*, 16 A. L. Reg. 80.

If the promise is to pay out of the proceeds of certain work, the plaintiff must prove that the bankrupt has received the proceeds. *Dearing v. Moffitt*, 6 Ala. 776.

There is no distinction between a promise made after the filing of the petition, but before the certificate, and one made after it. Both are equally binding, the only consideration being the old debt. *Hornthal v. McRae*, 67 N. C. 21; *Fraley v. Kelly*, 67 N. C. 78; *Donnell v. Swain*, 8 Penn. L. J. 393; *Corliss v. Shepherd*, 38 Miss. 550; *Otis v. Gazlin*, 31 Me. 567; *Stillwell v. Coope*, 4 Denio, 225. Contra, *Stebbins v. Sherman*, 1 Sandf. 510; *Ingersoll v. Rhoades*, Hill & D. Supp. 371.

If the bankrupt, after the filing of his petition, continues to deal with a creditor whose name is not placed upon his schedule, and makes payments without directing that they shall be applied to the subsequent purchases, they will be applied in their order to the first items of his account. *Hill v. Robbins*, 22 Mich. 475; s. c. 1 Mich. N. P. 305.

If the action is against a firm, the new promise must be made by both partners. *Brett v. Osner*, 2 W. N. 601.

The statute of limitations only commences to run from the time of the new promise. *Horner v. Speed*, 2 Pat. & H. 616.

A State law requiring the new promise to be in writing is valid, although it applies to a promise made before its adoption, for it prescribes the kind of evidence necessary to establish a fact, and regulates the remedy. *Kingley v. Cousins*, 47 Me. 91.

If there has been a new promise, the debt may be enforced, although it was proved in the proceedings in bankruptcy. *Mason v. Hughart*, 9 B. Mon. 480.

The benefit of the new promise does not pass to the indorsee of the note to whom it is subsequently indorsed, for the new promise is not negotiable. *Wardwell v. Foster*, 31 Me. 558; *White v. Cushing*, 30 Me. 267; *Walbridge v. Harroon*, 18 Vt. 448.

A new promise made to the payee of a negotiable note is a promise to pay to him or order, according to its tenor, and will inure to the benefit of a subsequent indorsee. *Way v. Sperry*, 60 Mass. 238; *Underwood v. Eastman*, 18 N. H. 582.

A new promise to pay a specialty debt does not revive the original debt as a debt by specialty, but the original debt is merely a good consideration for the new promise. *Field's Estate*, 2 Rawle, 351; *Graham v. Hunt*, 8 B. Mon. 7.

If the debt has been revived by a new promise, an action of debt may be maintained on a judgment. A new promise places the debt in the

same condition as it was before the discharge, and is a full and complete answer to the discharge. *Otis v. Gazlin*, 31 Me. 567; *Maxim v. Morse*, 8 Mass. 127.

The creditor should wait until the proceedings in bankruptcy are fully closed, for the promise must be understood as meaning only to pay so much as may remain unpaid after exhausting all the assets, and after the assignee has fully reported. *Mason v. Hughart*, 9 B. Mon. 480.

Whether the debtor has made a new promise will not be determined upon conflicting evidence on a motion for leave to issue an execution. *Shuman v. Strauss*, 10 B. R. 300; s. c. 52 N. Y. 404; s. c. 34 N. Y. Supr. 6.

When the bankrupt has promised to pay the debt after his discharge, the creditor may bring his action upon the original demand, and reply the new promise in avoidance of the discharge set out in the plea. The discharge bars the debt sub modo only, and the new promise operates as a waiver of the defense which the discharge gave. *Dusenbury v. Hoyt*, 10 B. R. 313; s. c. 53 N. Y. 521; s. c. 14 Abb. Pr. (N. S.) 132; s. c. 36 N. Y. Supr. 94; *Maxim v. Morse*, 8 Mass. 127. Contra, *Egbert v. McMichael*, 9 B. Mon. 44; *Carson v. Osborn*, 10 B. Mon. 155.

The creditor may, if he so elects, ground his action on the new promise instead of the original debt. *Horner v. Speed*, 2 Pat. & H. 616.

If the declaration is based on a new promise, it need not set forth the original consideration for the debt where a note has been given therefor. *Egbert v. McMichael*, 9 B. Mon. 44.

A declaration on a conditional promise need not state in what the defendant's ability to pay consisted. *Horner v. Speed*, 2 Pat. & H. 616.

A conditional promise and an unconditional promise may be joined in the same declaration. *Ibid.*

If the plaintiff avers an absolute and unconditional new promise, he can not prove a conditional promise by the bankrupt to pay when he is able. *Egbert v. McMichael*, 9 B. Mon. 44.

If the defendant, after a demurrer to a replication of a new promise has been overruled, files a rejoinder, this is a waiver or withdrawal of the demurrer, and leaves him in the same condition as he would have been had the demurrer never been filed. *Carson v. Osborn*, 10 B. Mon. 155.

If the words are capable of being construed as a promise, it is for the jury to determine whether the bankrupt, by the words, intended to promise to pay the debt. *Pratt v. Russell*, 61 Mass. 462; *Bennett v. Everett*, 3 R. I. 152.

Where the evidence is conflicting, it is for the jury to determine whether the promise was absolute or conditional. *La Tourrette v. Price*, 28 Miss. 702.

If a verdict is found in favor of the plaintiff, and the cause of action is based on the original debt instead of the new promise, the verdict will not authorize the court to enter a judgment against the defendant. *Carson v. Osborn*, 10 B. Mon. 155.

If the plaintiff avers a new promise to a plea of discharge in an action on a judgment, and the defendant rejoins, judgment will be entered on

the verdict, although the defendant moves in arrest of judgment. *Maxim v. Morse*, 8 Mass. 127.

**Plea of Discharge.**—The State court does not lose jurisdiction of the person of the defendant by his being adjudicated a bankrupt. A judgment may be rendered against him if he does not plead his discharge. A discharge will not avail unless it is pleaded. *Manwarring v. Kouns*, 35 Tex. 171; *Park v. Casey*, 35 Tex. 536; *Fellows v. Hall*, 3 McLean, 487; *Stewart v. Green*, 11 Paige, 535; *Freeman v. Warren*, 3 Barb. Ch. 635; *Scymour v. Browning*, 17 Ohio, 362; *Taylor v. Renn*, 8 C. L. N. 410; *Horner v. Spelman*, 78 Ill. 206.

A discharge should be pleaded both at law and in equity, and can not be taken advantage of by motion. *Fellows v. Hall*, 3 McLean, 281.

No time is prescribed within which a discharge must be pleaded. If the discharge is pleaded in the proper order, and at the proper stage of the proceedings, it makes no difference whether the time is long or short. *Pugh v. York*, 74 N. C. 383.

The court in its discretion may allow a plea of a discharge although a long time has elapsed since it was obtained. *Falkner v. Hunt*, 76 N. C. 202.

If the defendant becomes bankrupt while the action is pending, he has a right to plead his discharge as soon as he obtains it. *National Bank v. Taylor*, 120 Mass. 124.

If a discharge is obtained after the institution of a suit to which it would be a bar, the defendant, on motion, will be allowed to plead it in a supplemental answer. *Lyon v. Isett*, 34 N. Y. Supr. 41.

An application for leave to set up a discharge by a supplemental answer is addressed to the discretion of the court, and will be denied when there has been unreasonable delay in making it. *Medbury v. Swan*, 8 B. R. 537; s. c. 46 N. Y. 200; *Barstow v. Hansen*, 4 N. Y. Supr. 569; s. c. 9 N. Y. Supr. (Hun) 333.

Leave to file a supplemental answer setting up the discharge must be granted unless the papers show a case in which the court may exercise a discretion as to granting or withholding it. *Holyoke v. Adams*, 13 B. R. 413; s. c. 59 N. Y. 233.

If a judgment by default constitutes a lien on the debtor's land, and is permitted to stand as a security for the creditor's claim upon leave given to the defendant to answer, a supplemental answer setting up a discharge will not be allowed, for that would defeat the lien. *Barstow v. Hansen*, 4 N. Y. Supr. 569; s. c. 9 N. Y. Supr. (Hun) 333.

A plea of a discharge can not defeat an action to set aside a fraudulent conveyance instituted before the commencement of the proceedings in bankruptcy. *Phelps v. Curtis*, 16 B. R. 85.

If the bankrupt pleads his discharge in an action to set aside a fraudulent conveyance instituted before the commencement of the proceedings in bankruptcy, no personal judgment can be rendered against him. *Ibid.*

A discharge will not preclude a recovery if the bankrupt promised to pay the debt after the granting thereof. *Classen v. Schoeneman*, 16 B. R. 98.

A discharge is a matter which a court may allow to be set up by an amendment of the proceedings. *Richards v. Nixon*, 20 Penn. 19.

If a discharge is obtained after an answer in equity has been filed, special leave should be given to the defendant that he may plead it. *Fellows v. Hall*, 3 McLean, 281.

When a discharge is obtained after the pleadings are closed in a suit in equity, it is usually pleaded as a defense at the very next term happening after the last continuance. If a long delay afterward intervenes, it can not be pleaded unless a good excuse is given for the delay and on suitable terms. *Doggett v. Emerson*, 1 W. & M. 195; *Smith v. Babcock*, 2 W. & M. 246.

A discharge granted after the commencement of the suit should be pleaded in bar of its further maintenance, and not in bar generally. *Kunsler v. Kohaus*, 5 Hill, 317.

If the discharge is obtained after pleas have been filed, it should be pleaded *puls darrein continuance* not in bar of the action, but to the further prosecution of the suit, and can not be given in evidence under the other pleas. *Corpening v. Grinnell*, 10 Ired. 15.

If there has been no personal service of the writ on the defendant, and the plea is filed at the first term at which he appears, it need not be pleaded in bar of the further maintenance of the action, for when the matter of the plea in bar of the further maintenance is, in the first instance, and before any other plea filed, pleaded in bar, it need not be alleged to be *puls darrein continuance*. *Cutter v. Folsom*, 17 N. H. 139.

A plea *puls darrein continuance* need not state the time when the defendant pleads. *Keene v. Mould*, 16 Ohio, 12.

If a plea of a discharge in bankruptcy is put in as a plea *puls darrein continuance*, the court may set it aside when it is manifestly fraudulent and against the justice of the case. *Zollar v. Janvrin*, 49 N. H. 114.

A plea of a discharge must set forth a copy of the discharge. *Stoll v. Wilson*, 14 B. R. 571; s. c. 38 N. J. 198.

A complaint setting up a discharge is sufficient, although it does not set forth a copy thereof. *Hayes v. Ford*, 15 B. R. 569.

A plea of a discharge in bankruptcy is sufficient if it sets out a discharge duly authenticated. *Lathrop v. Stuart*, 5 McLean, 167; *White v. How*, 3 McLean, 291; *McNeil v. Knott*, 11 Ga. 142; *Rowan v. Holcomb*, 16 Ohio, 463; *Downer v. Chamberlin*, 21 Vt. 414; *Reed v. Vaughn*, 10 Mo. 447; *Morrison v. Woolson*, 23 N. H. 11; *Preston v. Simons*, 1 Rich. 262; *Keene v. Mould*, 16 Ohio, 12.

It is not necessary that the plea shall set out the proceedings at large. If the court appears to have had jurisdiction and to have granted the discharge, any mere error in the course of its proceedings would not avail to defeat the discharge. If the proceedings were set forth in detail, most of the averments could not be traversed, as that would only lead to an immaterial issue. It is, therefore, only necessary to set forth enough to show that the court had jurisdiction of the case and granted the discharge. *Johnson v. Ball*, 15 N. H. 407; *Morrison v. Woolson*, 23 N. H. 11; *McCormick v. Pickering*, 4 N. Y. 276; *Price v. Bray*, 21 N. J. 13.



The facts to be stated distinctly in a plea of discharge in voluntary bankruptcy, for the purpose of showing the jurisdiction of the district court to grant the discharge, are: 1st. The residence of the defendant, or the place where he carried on business. 2d. The existence of debts to the amount of \$300. 3d. That the defendant presented a petition to the district court where he resided or carried on business, and that the petition contains what the act required that it should contain. If the plea shows these facts the presumption is thenceforward in favor of the regularity of the proceedings. *McCormick v. Pickering*, 4 N. Y. 276.

The plea should set forth what court entertained the case and granted the discharge. *Morrison v. Woolson*, 29 N. H. 510.

It is not sufficient to aver that the defendant was a bankrupt, but the plea must aver that he owed provable debts. *Coates v. Simmons*, 4 Barb. 403.

The plea must plead the discharge, and not merely a decree granting a discharge. *Hayes v. Flowers*, 25 Miss. 169. *Contra*, *Viele v. Blanchard*, 4 Greene, 299; *Magoon v. Warfield*, 3 Greene (Iowa), 293.

A plea of the commencement of proceedings in bankruptcy which does not set forth a discharge is bad. *Atkinson v. Fortinberry*, 15 Miss. 302.

Facts which are necessary to confer jurisdiction must be positively stated. Hence the plea must allege that the defendant owed debts to the requisite amount, not that he filed a petition setting forth that he owed such debts. *Varnum v. Wheeler*, 1 Denio, 331.

The plea must aver that the defendant resided or carried on business in the district where the petition was filed at the time of the filing thereof. *Johnson v. Ball*, 15 N. H. 407; *Loring v. Kendall*, 67 Mass. 305.

The plea must allege that the defendant applied to the district court by petition setting forth the list of his creditors and inventory of his assets as required by law. *Cutter v. Folsom*, 17 N. H. 139.

The plea of a discharge in involuntary bankruptcy need not aver the existence of the facts upon which the creditors were authorized to file the petition. An averment in general terms that the defendant had become a bankrupt is sufficient. *Stephens v. Ely*, 6 Hill, 607.

The plea must allege that the discharge was granted by the court and not the judge. *Sackett v. Andross*, 5 Hill, 327.

It is not necessary to set out all the steps which were taken in obtaining the discharge, but it is necessary to show that the court acquired jurisdiction to grant it. It is not enough to say in general terms that the court had jurisdiction, but the facts on which jurisdiction depends must be specially set forth. *Sackett v. Andross*, 5 Hill, 327; *Stow v. Parks*, 1 Chand. 60; *Stoll v. Wilson*, 14 B. R. 571; s. c. 38 N. J. 198.

The plea need not aver that the court granting the discharge had jurisdiction to entertain the proceedings. *Lathrop v. Stuart*, 5 McLean, 167.

No direct and formal admission of the cause of action is necessary in a plea of a discharge. It is enough that the cause of action is not denied, for not being denied it is in law admitted. A plea which says that "the supposed cause of action, if any there was," is sufficient. *Morrison v. Woolson*, 23 N. H. 11.

The plea must aver that the claim in suit was a provable debt. *Hayes v. Flowers*, 25 Miss. 169; *Sackett v. Andross*, 5 Hill, 327.

If the plea avers that the debt which is the cause of action was due and owing at the time of the commencement of the proceedings in bankruptcy, it need not aver that the debt was provable. *Morrison v. Woolson*, 23 N. H. 11.

The plea need not allege that the debt was provable where the debt alleged in the declaration is prima facie provable. If there is any peculiarity which exempts the debt from the operation of the discharge, the plaintiff must set it forth in his replication. *Cutter v. Folsom*, 17 N. H. 139.

The plea of a discharge in an action upon a bail bond should aver the date of the final dividend of the bankrupt's assets, and that the liability was fixed before that time. *Houston v. State*, 34 Tex. 542.

When the plea consists of matter of fact as well as matter of record, it should conclude with an ordinary verification. *Price v. Bray*, 21 N. J. 13; *Kirby v. Garrison*, 21 N. J. 176; *Downer v. Chamberlin*, 21 Vt. 414; *Preston v. Simons*, 1 Rich. 262.

The defendant may conform to the practice of the State court, and plead the general issue, and give notice of his discharge where that mode of pleading is allowed. *Campbell v. Perkins*, 8 N. Y. 430; s. c. 5 Barb. 699.

The plea of a discharge in bankruptcy introduces new matter in confession and avoidance of the plaintiff's claim, and ought to conclude with a verification. The plaintiff can then reply, and if the defendant thinks the replication sets up matter inadmissible under the bankruptcy act, he can raise the question by a demurrer. *Mayer v. Gimbel*, 30 Leg. Int. 5; *Stoll v. Wilson*, 14 B. R. 571; s. c. 38 N. J. 198.

A garnishee can not plead the discharge of the defendant. *Frazier v. Banks*, 11 La. An. 31.

If the bankrupt joins with his sureties in pleading his discharge, if the plea is insufficient for them it is bad for all. *Dyer v. Cleveland*, 18 Vt. 241; *Hall v. Fowler*, 6 Hill, 630.

A defective plea of a discharge in bankruptcy may be amended. *Stoll v. Wilson*, 14 B. R. 571; s. c. 38 N. J. 198.

A defective plea may be deemed to be cured by a replication and a verdict. *Dresser v. Brooks*, 3 Barb. 429.

If the bankrupt is sued jointly with others upon a joint contract, and pleads his discharge, the plaintiff may enter a nolle prosequi as to him, and prosecute the suit against the others. *Coburn v. Ware*, 25 Me. 330.

Where the discharge is obtained before the action is commenced, the plaintiff can not discontinue without the payment of costs. *Camp v. Gifford*, 7 Hill, 169.

If the defendant pleads his discharge to a pending action, the plaintiff, under the laws of Massachusetts, should be allowed to discontinue solely on the grounds of the discharge; or if the defendant insists on going to trial, he should be required to waive his discharge and to proceed on his other grounds of defense. *Geward v. Dunbar*, 58 Mass. 500.

**Demurrer.**—If the plea puis darrein continuance is filed, with leave of the court, it will not be held bad on demurrer, although the matter of the plea arose before the last continuance. *Keene v. Mould*, 16 Ohio, 12.

When a demurrer to a plea of a discharge is sustained, the judgment should be respondeat ouster. *Hayes v. Flowers*, 25 Miss. 169.

The suggestion of the pendency of the proceedings in bankruptcy suspends the cause until the final action of the bankruptcy court granting or denying a final discharge. If a demurrer to a plea of a discharge subsequently entered is sustained, the discharge is virtually out of the case, and the cause again stands suspended upon the suggestion of pending proceedings in bankruptcy, and the entry of a personal judgment against the bankrupt is irregular. *Gibson v. Green*, 45 Miss. 209.

**Replication.**—A replication admits the genuineness of the discharge. *Payne v. Able*, 4 B. R. 220; s. c. 7 Bush, 344.

If the debt is excepted from the operation of the discharge, the better practice is to declare as if there were no anticipation of a plea of a discharge, and when the plea is put in, to reply to the facts to avoid its effect. *Jacobson v. Horne*, 52 Miss. 185; *Brown v. Broach*, 52 Miss. 536.

If the plaintiff seeks to avoid the discharge, on the ground that the debt sued upon was of a fiduciary character, he should allege that fact in his replication to the plea. *Stow v. Parks*, 1 Chand. 60; *Rowan v. Holcomb*, 16 Ohio, 463; *Dick v. Powell*, 2 Swan, 632; *Cutter v. Folsom*, 17 N. H. 139; *McCabe v. Cooney*, 2 Sandf. Ch. 314. Contra, *Sackett v. Andross*, 5 Hill, 327; *Maples v. Burnside*, 1 Denio, 332; *Frost v. Tibbets*, 30 Me. 188; *Sorden v. Gatewood*, 1 Ind. 107; *Bivens v. Newcomb*, 2 Ind. 98.

If the plea omits to aver the filing of a petition in bankruptcy, the defect is waived by a replication. *Price v. Bray*, 21 N. J. 13.

When the plaintiff replies that the district court had no jurisdiction to grant the discharge, because the bankrupt did not at the time reside or carry on business within the district, and issue is joined thereon, parol evidence is not admissible to contradict the record, if that shows that the court had jurisdiction. *Lathrop v. Stewart*, 6 McLean, 630; *Reed v. Vaughan*, 15 Mo. 137. Vide *Stiles v. Lay*, 9 Ala. 795.

The plaintiff can not aver that the defendant did not become a bankrupt, or that he did not comply with all the requisites of the statute, or that he did not obtain a discharge. He may reply nul tiel record; or if he can not safely deny the record, he may plead that the cause of action has accrued since the commencement of the proceedings in bankruptcy, or a new promise. *Price v. Bray*, 21 N. J. 13.

If there is any matter which renders the discharge invalid, or takes the case out of its operation, the plaintiff may set it forth in the replication. *Johnson v. Ball*, 15 N. H. 407.

A replication in confession and avoidance admits every fact substantially set forth in the plea in bar; and if the discharge is substantially set forth in the plea, there can not, after a verdict, be a judgment non obstante veredicto, or a repleader. *Jenkins v. Stanley*, 10 Mass. 226.

A replication which sets forth several distinct allegations, each of which standing alone would be a sufficient answer to the plea, is bad, for duplicity. *McNulty v. Frame*, 1 Sandf. 128; *Downer v. Rowell*, 25 Vt. 397.

**Evidence.**—Parol testimony is not admissible to prove a discharge without sufficient excuse for the nonproduction of the certificate, for the certificate is the best evidence of the discharge. *Regan v. Regan*, 72 N. C. 195.

The validity of a discharge will not be determined on affidavits, but the allegations of the parties must be tried in a more formal way. *Bangs v. Strong*, 1 Denio, 619.

A discrepancy of dates in a certificate of discharge is no reason for excluding the record, where that is obviously a clerical error and time is immaterial. *Pennell v. Percival*, 13 Penn. 197.

It is not necessary to prove the proceedings in the district court preliminary to the granting of the discharge, for the certificate is conclusive. *Thompson v. Wiley*, 34 Me. 194.

The certificate itself is competent evidence of the fact of bankruptcy, without the production of the whole record. *Boas v. Hetzel*, 3 Penn. 268; *Morse v. Cloyes*, 11 Barb. 100; *Pennell v. Percival*, 13 Penn. 197; *Strader v. Lloyd*, 1 West. L. J. 396.

The certificate of discharge is admissible in evidence, although the plaintiff produces a full record of the proceedings, which does not contain any discharge, for the clerk may have neglected to make the entry of the final discharge. *King v. Dietz*, 12 Penn. 156.

If the certificate of discharge is to be used in another State, it should be authenticated by the seal of the court, the attestation of the clerk, and the certificate of the judge that the attestation is in due form. *Tappan v. Norvell*, 3 Sneed, 570.

If the clerk merely signs the certificate, without stating that the seal is the seal of the court, parol evidence is admissible to prove that fact. *Mason v. Lawrason*, 1 Cranch C. C. 190.

The authentication by the judge must certify that the clerk at the time of the certificate was the clerk of the district court, as well as that the exemplification is in due form of law. *Pennell v. Percival*, 13 Penn. 197.

A certified copy of a discharge granted by a district court in another State is not admissible in evidence without an authentication of the clerk's certificate by the judge. *Dorsey v. Maury*, 18 Miss. 298; *Heard v. Patton*, 27 La. An. 542.

A copy of the entire and full record of the proceedings is competent evidence of the discharge. The law prescribes no particular form in which the certificate of the clerk shall be made, and the part of the record not absolutely required is only surplusage. *Tompkins v. Bennett*, 3 Tex. 36.

If a copy of the discharge is produced, it will be presumed that the notice by publication was duly given. *Jones v. Knox*, 51 Ala. 367.

If the replication merely denies that the discharge was granted in manner and form as alleged in the plea, the defendant, upon the production

of a duly certified copy thereof, is entitled to a verdict, and neither the judge nor the jury can pass upon or decide as to the effect to be given to it. *Dresser v. Brooks*, 3 Barb. 429.

An objection that the clerk did not certify that he had compared the copy with the original, and that it was a correct transcript therefrom, and of the whole original, and that the seal was not impressed on wax, wafer, or other substance, if overruled at the trial, may be obviated on a motion for a new trial by the production of a copy duly authenticated in the precise form required by the objection. *Ibid*.

A duly certified copy of a discharge is admissible in evidence, in an action to recover a debt, although the creditor was not notified of the proceedings in bankruptcy, for the court in the absence of proof can not presume that it does not operate to discharge the debt. *Thornburgh v. Madren*, 33 Iowa, 380.

The plea of bankruptcy must be supported by proper evidence. *Owens v. Grimsley*, 44 Ala. 359.

The production of a certificate of discharge will not authorize the court to dismiss the suit. This plea in bar is not different from any other plea. The fact of discharge is a matter to go to the jury, just like any other fact. *Austin v. Markham*, 10 B. R. 548; s. c. 44 Ga. 161.

The burden of maintaining that the debt was provable, is on the bankrupt. If it does not clearly appear when the petition was filed, that fact may be left to the jury. *Clement v. Hayden*, 4 Penn. 138.

When the discharge is given in evidence without being pleaded, jurisdiction to grant it is presumed until the contrary appears. *Rucknam v. Cowell*, 1 N. Y. 505.

**Practice in Appellate Tribunals.**—If a party in whose favor judgment was rendered in the subordinate court is declared bankrupt, and obtains a discharge before the judgment is reversed in the appellate court, a decree may be entered upon the reversal, that no execution shall issue upon the judgment without a previous order to that effect made by the subordinate court, after reasonable notice to the party to appear and show cause, if any he can, against it. *Exchange Bank v. Knox*, 19 Gratt. 780.

When a party against whom a judgment has been rendered, takes an appeal, and gives bond with surety to pay such judgment as may be entered in the appellate court, where the case is brought up for a new trial before a special jury, and after appeal is taken is adjudged a bankrupt, and duly obtains a discharge, he may plead such discharge in the appellate court, and the suit will not be allowed to proceed to judgment to bind the surety. The contract of the surety was to pay the judgment that might be entered. But as no judgment could be rendered against his principal, no liability attached to him. He complied with the contract, and his liability was terminated. *Odell v. Wootten*, 4 B. R. 183; s. c. 38 Ga. 225.

An appellate court can not entertain a petition to set aside a judgment rendered by it after the granting of the discharge in bankruptcy. If it were to entertain it, the opposite party would have the right to controvert

the facts stated therein. This might result in issues of fact and of law which would constitute a new lawsuit. None but a court with original jurisdiction could try and determine this issue. *Riggs v. White*, 4 Heisk. 503.

The bankruptcy of the plaintiff or defendant, after the judgment or decree of an inferior court, can not be made available in the appellate court by a plea in abatement, although the bankruptcy may have occurred and the discharge have been granted before the filing of the record for writ of error. *Longley v. Swayne*, 4 Heisk. 506, note.

A certificate of discharge is a bar to further proceedings in an appellate court to obtain a reversal of a judgment rendered in favor of the bankrupt, who is defendant in the case. *Fox v. Weed*, 21 La. An. 58.

If a judgment on which an appeal is pending is proved, the appellate court may order that the appellant be discharged therefrom. *Haggerty v. Morrison*, 59 Mo. 324.

The appellate court, after a discharge, can render no judgment in a case except that of dismissal. *Vlosca v. Weed*, 22 La. An. 218.

The suggestion of the discharge of the defendant while his appeal is pending, can have no effect in the appellate court. The remedy is by a motion for a perpetual stay of execution. *Cornell v. Dakin*, 38 N. Y. 253.

If a discharge is obtained after rendition of the judgment in the subordinate court, the appellate court may in its discretion reverse the judgment pro forma, in order to enable the defendant to plead his discharge. *Bank v. Onion*, 16 Vt. 470.

If the defendant against whom a judgment has been rendered, obtains a discharge between the argument of the cause in the appellate court, and the decision affirming the judgment, the appellate court on application will order a perpetual stay of execution. *Parks v. Goodwin*, 1 Mich. 35.

Where the party against whom a judgment has been rendered, neglects to inform his attorney that he has obtained a discharge, because he supposes that his discharge is a sufficient protection, and the attorney brings the case to a hearing in the appellate court without setting up the discharge, the appellate court on motion will grant a perpetual stay of execution. *Bostwick v. Dodge*, 2 Doug. 331.

If on appeal the verdict is set aside, the defendant may plead his discharge when the case is remanded to the subordinate court. *Minot v. Brickett*, 49 Mass. 500.

A motion to discontinue without costs will be granted, although the defendant waives the benefit of his discharge. *Sandford v. Sinclair*, 6 Hill. 248.

The plaintiff in error may discontinue his suit without costs, if the defendant in error becomes bankrupt after the joinder in error. *Labron v. Woram*, 5 Hill. 373.

No costs will be allowed to the plaintiff in review, under the laws of Maine, where the reversal of the judgment is obtained by pleading a discharge obtained after the rendition of the judgment. *Foster v. Hinckley*, 40 Me. 54.

When judgment has been rendered against the plaintiff, he can not have leave to discontinue without costs on the bankruptcy of the defendant, although a writ of error is pending. He can only discontinue on the reversal of the judgment. *Sandford v. Sinclair*, 6 HILL, 248.

ACT OF 1898, CH. 3, § 15. **Discharges, when Revoked.**—(a) The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

ACT OF 1867, § 5120. Any creditor of a bankrupt, whose debt was proved or provable against the estate in bankruptcy, who desires to contest the validity of the discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to annul the same. The application shall be in writing, and shall specify which, in particular, of the several acts mentioned in section fifty-one hundred and ten it is intended to prove against the bankrupt, and set forth the grounds of avoidance; and no evidence shall be admitted as to any other of such acts; but the application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of the application to be given to the bankrupt, and order him to appear and answer the same, within such time as to the court shall seem proper. If, upon the hearing of the parties, the court finds that the fraudulent acts, or any of them, set forth by the creditor against the bankrupt, are proved, and that the creditor had no knowledge of the same until after the granting of the discharge, judgment shall be given in favor of the creditor, and the discharge of the bankrupt shall be annulled. But if the court finds that the fraudulent acts and all of them so set forth are not proved, or that they were known to the creditor before the granting of the discharge, judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by the proceedings.

Statute revised — March 2, 1867, ch. 176, § 34, 14 Stat. 533. Prior Statutes — April 4, 1800, ch. 19, § 34, 2 Stat. 30; Aug. 19, 1841, ch. 9, § 4, 5 Stat. 443.

There can be no legal fraud in a bankrupt's procuring an adjudication on involuntary proceedings unless it be followed by a discharge that

could not be had on voluntary proceedings. In re E. L. Matot & Co., 16 B. R. 485.

Discharge obtained by fraud will be vacated. A decree annulling a discharge can not be set aside except upon due notice to the parties to be affected thereby. In re Augenstein, 16 B. R. 252.

Discharge can not be impeached collaterally for fraud in preventing notice to creditors of pendency of proceedings, nor for the fact that the bankrupt, before proceedings in bankruptcy commenced, fraudulently removed his property out of the jurisdiction with intent to defraud his creditors. Howland v. Carson, 16 B. R. 372.

Ignorance of fact that a discharge has been granted, no excuse for delay in making an application to set it aside. In re Buchstein, 17 B. R. 1.

Where proceedings for review are not taken within the time prescribed, and the bankrupt has in the meantime acted upon his discharge, it will not be set aside for purpose of having a trial upon specifications filed in opposition to the discharge which had been overlooked. *Ibid.*

District court which granted a discharge alone has jurisdiction of a proceeding to annul it. Nicholas v. Murray, 18 B. R. 469.

The authority to set aside and annul a discharge in bankruptcy conferred upon the Federal courts by this section is incompatible with the exercise of the same power by a State court; and the former is paramount. A discharge duly granted, when pleaded in bar to the further maintenance of an action for a prior indebtedness, can not be impeached in a State court, for any cause which would have prevented the granting of it under section 5110, or been sufficient ground for annulling it under this section. Proceedings in bankruptcy are statutory proceedings. The powers exercised and the remedies provided in bankruptcy are given by statute. The impeaching tribunal is specified, and this designation, according to well-established principles of interpretation, forms a part of the remedy, and excludes all others. The authority of Congress over the subject of bankruptcies being paramount to State authority, where it has provided a mode of dealing with a bankrupt's estate, that mode only can be pursued; and it would be an infringement of the paramount law, if State courts should adopt another and a different mode. There is no distinction between actions brought before the debtor petitions to be adjudged a bankrupt, and those brought afterward. The authority of Congress over the subject-matter is the same in both cases. *Corey v. Ripley*, 4 B. R. 503; s. c. 57 Me. 69; *Parker v. Atwood*, 52 N. H. 181; *Oates v. Parish*, 47 Ala. 157; *Ocean National Bank v. Olcott*, 46 N. Y. 12; *Way v. Howe*, 1 B. R. 677; s. c. 108 Mass. 502; *Alston v. Robinett*, 9 B. R. 74; s. c. 37 Tex. 56; *Hudson v. Bingham*, 8 B. R. 494; s. c. 6 L. T. B. 326; s. c. 12 A. L. Reg. 637; *Dusenbury v. Hoyt*, 10 B. R. 318; 14 Abb. Pr. (N. S.) 132; s. c. 53 N. Y. 521; s. c. 36 N. Y. Supr. 94; *Reed v. Bullington*, 11 B. R. 408; s. c. 49 Miss. 223; *Stephens v. Brown*, 10 B. R. 568; s. c. 49 Miss. 597; *Smith v. Ramsey*, 15 B. R. 447; s. c. 27 Ohio St. 339; *Seymour v. Street*, 5 Neb. 85. *Contra*, *Perkins v. Gay*, 3 B. R.



772; s. c. 1 L. T. B. 221; s. c. 2 C. L. N. 279; s. c. 18 Pitts. L. J. 98; *Beardsley v. Hall*, 36 Conn. 270.

A discharge can not be impeached in a State court on the ground that the name of the creditor was fraudulently omitted from the schedules and he had no notice of the proceedings. *Black v. Blazo*, 13 B. R. 195; s. c. 117 Mass. 17; *Rayl v. Lapham*, 15 B. R. 508; s. c. 27 Ohio St. 452; *Millhous v. Aicardi*, 51 Ala. 594. Contra, *Barnes v. Moore*, 2 B. R. 573; s. c. 2 L. T. B. 92; *Batchelder v. Low*, 8 B. R. 571; s. c. 43 Vt. 662.

The circuit court has no jurisdiction to annul a discharge for frauds upon the statute, which would have prevented the bankrupt from receiving it. The district court alone has the power to inquire into such frauds. *Commercial Bank v. Buckner*, 20 How. 108.

The bankruptcy court has the same inherent power as all other courts to recall its own decrees, or to vary or annul them, as justice may require. All courts claim and exercise this power when it is the only remedy for the party aggrieved. When a sudden and overpowering accident prevents the attendance of the creditor's counsel at the hearing, the court will reopen the decree granting the discharge. The decree, however, will only be opened upon good cause shown, and for a trial upon the merits, and not upon any mere technical matter. *In re Dupee*, 6 B. R. 89; *Thomas v. Hunter*, 3 McLean, 297.

A suit to set aside a discharge of a bankrupt must be brought within two years from the time it was granted, although the creditor did not discover the cause therefor until a long time afterward, because the bankrupt had fraudulently concealed it. *Pickett v. McGavick*, 14 B. R. 236.

The certificate is, prima facie, conclusive as to the validity of the discharge, subject, however, to be impeached for fraud, if any was perpetrated in obtaining it. *Gupton v. Connor*, 11 Humph. 287.

The specifications must be precise and definite. *In re McIntire*, 1 B. R. 436; s. c. 2 Ben. 345; *in re Rainsford*, 5 B. R. 381; *Stewart v. Hargrove*, 23 Ala. 429; *Chadwick v. Starrett*, 27 Me. 138; *Tompkins v. Bennett*, 3 Tex. 36; *Lathrop v. Stewart*, 6 McLean, 630; *Drake v. Jones*, 3 Ala. 638; *Chambers v. Neal*, 13 B. Mon. 256; *Rand v. Upham*, 22 N. H. 39; *Shelton v. Pease*, 10 Mo. 473; *Hazard v. Boykin*, 8 Rob. (La.) 253.

The creditor can not contest the discharge on any ground not stated in the specification. *Ashley v. Robinson*, 29 Ala. 112.

The creditor may rely upon certain grounds, although other creditors relied on the same acts as a ground of opposition to the granting of the discharge. *Beekman v. Wilson*, 50 Mass. 434.

The decision on the specifications in opposition to the discharge is conclusive, although the creditor presents a different claim. *Wales v. Lyon*, 2 Mich. 276.

A creditor who has opposed the granting of the discharge may impeach it for other and further instances of fraud. The estoppel is limited to the specifications that were passed upon. *Downer v. Rowell*, 25 Vt. 336.

Under a specification of a judgment for \$133.81, a judgment for \$122.81 can not be given in evidence. *Ashley v. Robinson*, 29 Ala. 112.

If the bankrupt has willfully made a false oath by omitting the name of a creditor from his schedule, the discharge may be set aside upon the application of a creditor who had no knowledge of the act until after the granting of the discharge. *In re Chas. K. Herrick*, 7 B. R. 341.

Conveyances made by the bankrupt, and alleged to be fraudulent, can not be shown in evidence unless charged in the specifications, except so far as they may be used to show the intent of certain acts which are specified. *Tenney v. Collins*, 4 B. R. 477; s. c. 1 Dillon, 66.

The wife of a bankrupt can not be made a witness for or against her husband on a motion to set aside a discharge. *Tenney v. Collins*, 4 B. R. 477; s. c. 1 Dillon, 66, note; *in re Moritz Augenstein*, 2 McArthur, 322.

The dying declarations of an alleged fraudulent grantee are not competent evidence against the bankrupt. *In re A. P. Marionneaux*, 13 B. R. 222; s. c. 1 Woods, 37.

The conspiracy must be established before the declarations of an alleged conspirator are competent evidence against the bankrupt. *Ibid*.

A decree annulling a discharge can not be set aside without an application therefor and due notice thereof to the parties affected thereby. *In re Moritz Augenstein*, 2 McArthur, 322.

## **TITLE XI.**

### **PARTNERSHIPS AND CORPORATIONS.**

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**ACT OF 1898, CH. 3, SEC. 5. Partners.**— (a) A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

(b) The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

(c) The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

(d) The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

(e) The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

(f) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

(g) The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

(h) In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property

shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

ACT OF 1867, § 5121. Where two or more persons who are partners in trade are adjudged bankrupt, either on the petition of such partners, or of any one of them, or on the petition of any creditor of the partners, a warrant shall issue, in the manner provided by this Title, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted. All the creditors of the company, and the separate creditors of each partner, may prove their respective debts. The assignee shall be chosen by the creditors of the company. He shall keep separate accounts of the joint stock or property of the copartnership, and of the separate estate of each member thereof, and after deducting out of the whole amount received by the assignee, the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. If there is any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there is any balance of the joint stock after payment of the joint debts, such balance shall be appropriated to and divided among the separate estates of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts. The certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone. In all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

Statute revised — March 2, 1867, ch. 176, § 36, 14 Stat. 534. Prior Statute — Aug. 19, 1841, ch. 9, § 14, 5 Stat. 448.

Paying individual debt with partnership property, although both partners liable for such debt, is an act of bankruptcy by a partnership. In *re E. L. Matot & Co.*, 16 B. R. 485.

If on dissolution of a copartnership, the retiring partner takes out a portion of the assets of the firm for his individual use, he must do so without impairing the fund to which the creditors have the right in equity to look for payment, and it must be made clearly to appear that such remaining fund is ample. In *re Sauthoff & Olson*, 16 B. R. 181.

Agreement by member of a firm to consent and procure the consent of the partners to an adjudication against the firm, is valid, and the consideration therefor may be recovered. *Sanford v. Huxford*, 17 B. R. 385.

A partner will not be allowed to put his firm, whose affairs were settled years ago, into bankruptcy, on the allegation that it is insolvent by reason of petitioner's own fraud in effecting a composition with its creditors. In *re Hamlin, Hale & Co.*, 16 B. R. 522.

Where the petitioning partner has obtained, without consideration, assignments to his father of a large number of the pretended claims against his firm: Held, that this conduct, under circumstances of the case, is a fraud on the bankruptcy law. *Ibid.*

An adjudication against a firm obtained by one member, in voluntary petition, without giving notice, as required by Rule XVIII (Law of 1867), was void. In *re Temple*, 17 B. R. 345.

A partnership dissolved by death of one member not to be treated as still subsisting subject to bankruptcy law, but the survivor being adjudged bankrupt individually and as such surviving partner, his assignee was entitled to possession of firm assets. *Ibid.*

Court has jurisdiction, on voluntary petition for adjudication of a firm, to entertain and determine the question what persons in fact constitute firm, and same is valid until set aside or reversed. In *re Griffith & Wundrum*, 18 B. R. 510.

After a delay of six years before making application to set aside such an adjudication because there was another partner than alleged in petition, such application should be denied on ground that rights and interests of others had grown up under it and been adapted to it. *Ibid.*

Adjudication of a copartnership must be made in one proceeding, under one petition; and adjudication of one member in one proceeding and of the other members, as members of another firm, in another, is not an adjudication of the copartnership, and the bankruptcy court will not thereby acquire jurisdiction over estate of the copartnership. In *re Plumb*, 17 B. R. 76.

Where requisite number of creditors join in petition against a firm, it is not necessary that they should all be creditors of the firm. In *re E. L. Matot & Co.*, 16 B. R. 485.

From the schedules annexed to a petition filed by one partner of a dissolved firm against his copartners for an adjudication of the firm it appeared that the firm had been dissolved by judicial decree, and all its assets transferred to a receiver, and that there were firm debts. Held,

that the firm could not be adjudicated. In *re Hopkins v. Carpenter et al.*, 18 B. R. 339.

A sale of his interest for a valuable consideration by one partner to the other, where the firm is insolvent, does not of itself constitute fraud. *Russell, Assignee, v. McCord, Assignee*, 17 B. R. 508.

Under the law of 1867, it was held that where, in a voluntary petition of partners in trade, the names of any of the copartners are withheld, creditors can not supply the omission, because in voluntary proceedings that law provided for a proceeding in invitum against nonjoining parties only at the instance of their petitioning associates. *Citizens' Nat'l. Bank v. Cass*, 18 B. R. 279.

Such omission would not affect the rights of creditors against creditors who are not parties to the proceeding. The law left them in possession of all remedies against parties not joined which they had before. *Ibid.*

If any were excluded who ought to be joined, the court would refuse to petitioning parties the benefit of the act, and leave them, as well as their associates who refused to join, subject to all the remedies to which their creditors might resort, irrespective of bankruptcy proceedings. *Ibid.*

So long as there are undistributed partnership assets and partnership debts or liabilities, the firm may be adjudicated bankrupt. In *re Gorham*, 18 B. R. 419.

As between himself and the firm creditors, one member of a firm can not estop himself by any dealings with his partner from any duty he owes these creditors. *Ibid.*

A firm in which one G. was a partner, having expired by limitation, the interests of the other partner were transferred to him by bills of sale, and at the same time he entered into an agreement to faithfully apply the firm assets to the payment of the firm debts. He afterward filed a voluntary petition in bankruptcy and included the firm assets and debts in his schedule. Held, that another member of the firm had a right to intervene and have the firm adjudicated, to the end that the firm assets might be applied to the payment of the firm debts. *Ibid.*

The bankrupt entered into a contract with one S., by which he undertook to carry on the butchering business for S., as his agent and salesman. The contract provided that the "offal, feet, and the commission on hides, and the usual slaughter-house perquisites," were to go to S., and the bankrupt was to receive, in lieu of wages, all he could make over and above the current price of cattle bought, after deducting all expenses. Held, that the agreement did not create a partnership. In *re Blumenthal*, 18 B. R. 555.

Where a separate adjudication is made against a bankrupt who is or has been a member of a firm, the separate creditors have a right to vote for the assignee. In *re F. A. Falkner*, 16 B. R. 503.

Where all members of one firm are partners in another firm, and a bank has discounted drafts drawn by the former firm upon one who is a partner with the members of such firm in the latter firm, it can not prove its claim against the joint estate, but must look to the separate estate of the drawee. In *re Savage et al.*, 16 B. R. 368.

Where one member of a firm indorses an accommodation note in the firm name, for the benefit of a third party, without consent or knowledge of his copartner, such note can not be proved against the firm assets. In re Irving, 17 B. R. 22.

Where real estate has been held by partners as tenants in common, the classification thereof as partnership assets, in the schedule filed by them, will not change the nature of the title to the prejudice of the rights of separate creditors. In re Zug & Co., 16 B. R. 280.

As to questions touching the tenure of real estate, the Federal courts are to be governed by the laws and decisions of local tribunals of the country where such real estate is situated. Ibid.

Where T. and S. have become partners and, preliminary to beginning their copartnership business, negotiated a loan of money, giving therefor their joint note, but signing the same by their individual names, and the money was treated as a copartnership fund, and applied to the business uses of the firm; Held, that the debt was a firm liability. In re Thomas & Sivyver, 17 B. R. 54.

Joint creditors share equally in joint assets, whether their debts are partnership debts or not. In re Nims & Long, 18 B. R. 91.

The bankrupts were formerly partners under the firm name of O. L. Nims & Co., and failed without assets. Shortly thereafter they commenced business again as partners under the name of L. O. Nims, agent, and failed, leaving assets. Held, that the creditors of the old firm were entitled to share equally with the partnership creditors in the partnership assets. Ibid.

Where there is an undoubted partnership, oral evidence is admissible to prove that the factory in which the partners carried on their business, and upon which they expended their money, was a part of the capital stock contributed by them; and where such evidence is clear and undisputed, and admitted to be true, the property in question is to be treated in bankruptcy as the property of the firm — if on no other ground, then clearly on that of part performance. In re Farmer et al., 18 B. R. 207.

The bankrupts, as agents, consigned goods of the corporation for sale to an English firm, of which B. was a member. Prior to the receipt of the goods said firm had accepted and paid drafts of the bankrupts to an amount exceeding the value of all their consignments, and on that account claimed that they had accounted to the bankrupts and paid over the proceeds of the goods to them. Held, that this was not a payment which would discharge said firm from liability, and that the claim for such proceeds being for a partnership liability of B. ranks in the distribution of his individual estate after his individual debts. In re Baxter & Ralston, 18 B. R. 62.

A joint creditor, in case of the separate bankruptcy of one member of the firm, has a right to prove his joint debt, and vote for assignee in the separate bankruptcy. In re Webb, 16 B. R. 258.

It was held (Law of 1867) that where the individual property of one of the members of a firm is pledged for a debt of the firm the creditor may, and

indeed is bound to prove, at the request of the separate creditors, his whole debt without deduction against the joint assets; but can only prove the deficiency, after disposing of the security, against the separate assets of such partner. *In re May & Co.*, 17 B. R. 192.

Bankrupts were general business agents of a corporation, and as such were authorized to receive and disburse all moneys of the corporation "except subscriptions to its capital stock." B., one of the bankrupts, was the treasurer of the corporation, received subscriptions to the capital stock, which he paid into the business of his firm. It did not appear that any stockholder or director of the corporation except B. and his partner had any knowledge of the misappropriation of the funds. Held, that B. was liable personally therefor; that the firm, having taken the funds with knowledge that it was not entitled to receive the same, was equally liable and that proof could be made against both estates. *In re Baxter & Ralston*, 18 B. R. 62.

Where one member of a firm was adjudged bankrupt without any adjudication against the firm, and there were at the time firm assets, the estate of the firm is not in bankruptcy so as to make a discharge operative as to the firm debts. *In re Plumb*, 17 B. R. 76.

**When Partnerships may be Adjudged Bankrupts.**—Two or more persons "who are partners" in trade, may be adjudged bankrupt on the petition of the partners or any one of them. This language can only apply to a subsisting partnership. But a mere formal dissolution of the partnership, so long as there are partnership debts and partnership assets existing, the partners being joint debtors and the assets being joint property, will not prevent the operation of the act upon the partners, either in a voluntary or an involuntary case. Where there are assets as well as debts of the partnership remaining, the partnership may properly be considered as subsisting quoad its creditors, and for the purpose of applying its joint stock and property to the payment of its creditors. *Crockett v. Jewett*, 2 B. R. 208; s. c. 2 Ben. 514; s. c. 2 L. T. B. 21; *in re Elisha Foster*, 3 B. R. 236; s. c. 3 Ben. 386; s. c. 1 L. T. B. 127; *in re H. C. McFarland & Co.*, 10 B. R. 381.

Where partnership affairs are to be wound up, the partners may join or be joined in one petition. If it were not so, the partners would always have it in their power to defeat one of the main provisions of the law, which is, that the creditors of the firm shall choose the assignee. It seems to be settled that there may be a joint petition so long as joint assets remain to be distributed. A like result must also follow if there are joint debts outstanding. It is for the benefit of the joint creditors, so long as any remain, that the proceedings should be joint, because they have the choice of the assignee. Whether there are any joint assets or not may often be disputed, and be the very question which an assignee is needed to try; but the fact of joint creditors whose rights are to be protected is easy of ascertainment, and, when ascertained, shows a necessity for a joint action. So long as joint debts remain outstanding and unsettled, the proceedings, whether voluntary or involuntary, may be joint. *In re Williams & Co.*, 3 B. R. 286; s. c. Lowell, 406; s. c. 2 L. T. B. 100; *in re*



Joseph A. Noonan, 10 B. R. 331; s. c. 3 Biss. 491. *Contra*, Crockett v. Jewett, 2 B. R. 208; s. c. 2 Ben. 514; s. c. 2 L. T. B. 21; *in re* Moritz & Pinner, 5 Law Rep. 325; *in re* Mark Hartz et al., 1 N. Y. Leg. Obs. 39.

A fraudulent dissolution will not oust the jurisdiction of the district court over a petition in invitum filed thereafter. *In re* Waite & Crocker, 1 B. R. 373; s. c. Lowell, 207.

A dissolution of a partnership, though binding as between the parties themselves, can not have any effect upon the rights of those who subsequently become creditors, provided the partners continue to treat each other, in point of fact, as partners, and to act as such in their business transactions with others. *In re* H. C. McFarland & Co., 10 B. R. 381.

An agreement for a dissolution, stipulating that one partner shall take the partnership property, and apply it to the payment of the partnership debts does not dissolve the partnership as to the other partner and the creditors, nor does the transfer make the property the individual property of the partner receiving it, until and unless the partnership debts are first paid. The case is not one where the transfer of the interest of the retiring partner in the partnership property is absolute, and the remaining partner merely agrees to pay and assume the debts of the partnership. *In re* T. S. Shepard, 3 B. R. 172; s. c. 3 Ben. 347.

Although one partner has taken the partnership property under an agreement to pay all the partnership debts, either of them may, after such dissolution, petition for the benefit of the act on behalf of the firm. The partner who petitions is acting for the creditors as well as himself, and the creditors may proceed against all the partners in bankruptcy, unless they have agreed to accept one as their debtor. Such a proceeding by partners differs in this from one by creditors, that no act of bankruptcy need be alleged, but only that the firm is insolvent. If a partner could not petition by reason of any contract with his copartner, the creditors would be deprived of the very important power of procuring adjudication through the petition of one partner, when the firm is clearly insolvent, but no technical joint act of bankruptcy has been committed. *In re* J. R. Stowers et al., Lowell, 528.

A partner, by intrusting his copartner with the payment of the debts, takes the risk of his being both able and willing to do so, and in defense to the petition of such copartner, can not set up that he left the firm solvent, and that the act of the petitioner changed the state of affairs. *Ibid*.

When it is made to appear that the interests of creditors will not be served by bankruptcy, and that they do not press the case, but it is brought forward by one partner for ends of his own, he must fully and clearly establish the insolvency of his copartner. *In re* Bennett et al., 12 B. R. 181.

An assignment which transfers all the right, interest, property and claims of the retiring partner in and to the partnership and firm business, terminates the partnership. Persons who are not partners in trade, or who do not at the time of the filing of the petition have any joint stock or property belonging to the firm of which they have been members, can not be brought jointly into bankruptcy. *Hartough v. Hayden*, 3 B. R. 422.

A member of a firm may commit a separate act of bankruptcy and become bankrupt without joining his copartners. When two persons who have been partners under one firm name file their joint petition in bankruptcy, the proceedings can not be stayed on the ground that they have omitted to bring in a third person who has been a partner with them under another firm name. If such third person shall apply to have the other firm adjudged bankrupt, the court may consolidate the suits, if expedient, or arrange in some other appropriate way, that the greatest convenience to creditors shall be arrived at with the least expense. The rights of all classes of creditors are the same, under all forms of proceeding. In *re Mitchell et al.*, 3 B. R. 441; in *re R. Stevens*, 5 B. R. 112; s. c. 1 Saw. 397.

The institution of proceedings in a State court for a dissolution of the firm and the appointment of a receiver, will not prevent the bankruptcy court from taking jurisdiction. In *re Joseph A. Noonan*, 10 B. R. 331; s. c. 3 Bliss. 491; in *re Hathorn & Batchelor*, 2 Woods, 73.

If a firm is dissolved by the death of one of the partners, the executors of the deceased partner can not be brought into bankruptcy, nor can possession be taken of his separate estate, which is under the process and control of a probate court. Hence no proceedings can be taken under this section against the estate of a deceased partner. But if the surviving partner, while clothed with his rights as such, commits an act of bankruptcy, the creditors may invoke the aid of a court of bankruptcy to take out of his hands the joint assets as well as his separate estate, and distribute them among his creditors. Such proceedings can be taken against him by either a joint or separate creditor. In *re R. Stevens*, 5 B. R. 112; s. c. 1 Saw. 397.

If the administrator of the deceased partner has given the necessary bond and taken charge of the partnership property, which he is administering in the probate court, the district court may, in its discretion, refuse to adjudge the partnership bankrupt. In *re Daggett et al.*, 8 B. R. 433; s. c. 8 B. R. 287; s. c. 3 Dillon, 83.

**Mode of bringing Partnerships into Bankruptcy.**—The provisions of this section clearly contemplate that persons who are copartners may be adjudged bankrupts on three descriptions of petitions: 1st. The petition of all the copartners. 2d. The petition of one of the copartners. 3d. The petition of a creditor of the copartners. The proceeding by the petition of all the copartners is purely voluntary, and where they all unite, the jurisdiction of the court over all of them, either by residence or by carrying on business, must appear in the petition. The proceeding by the petition of a creditor of the copartners is a purely involuntary proceeding, and requires the adjudication to proceed on the commission of some act of bankruptcy. The proceeding by the petition of one of two or more copartners to have such copartners adjudicated bankrupts is a proceeding which necessarily is neither wholly voluntary nor wholly involuntary, but is partly voluntary and partly involuntary. So far as the petitioner is concerned, it is voluntary; so far as the copartners not petitioning is concerned, it is not involuntary, in the sense of section 5021, unless the adjudication is asked for on the ground of the commission of an act of bankruptcy, although it

may be involuntary in the sense of not being voluntary, under section 5014. Where it is not involuntary in the sense of section 5021, the adjudication may be asked on the ground that the members of the copartnership are unable to pay all their debts, and no allegation that an act of bankruptcy has been committed, either by the firm or by the copartners who are proceeded against, is necessary. A partner may also petition to have himself adjudged bankrupt, because of his inability to pay his debts, and to have his copartners adjudged bankrupts because of the commission by them of an act of bankruptcy to which he was not a party. *In re Penn et al.*, 5 B. R. 30; s. c. 5 Ben. 89; s. c. 2 L. T. B. 190; *in re Joseph Noonon*, 10 B. R. 331; s. c. 3 Bliss. 491.

The firm can not be adjudged bankrupt upon the petition of one partner if the other partners do not consent, and neither reside nor carry on business in the district. *In re Henry Martin*, 6 Ben. 20.

Where a petition is filed to have a firm declared bankrupt, if all the members of the firm do not join in or consent to the petition, notice of the filing must be given to such of the members as do not join in it or assent to it, in like manner as if the proceedings were on an involuntary petition against the members of the firm. Until this is done, the register has no authority to make an adjudication in regard to the bankruptcy of the firm. *In re Henry Lewis*, 1 B. R. 239; s. c. 2 Ben. 96; *in re Frankard et al.*, 1 B. R. 297; *in re Moritz & Pinner*, 5 Law Rep. 325; *in re Rufus E. Moore*, 5 Bliss. 79.

When a petition, in due form, for the adjudication of a firm has been filed by one partner, the other may come in voluntarily by petition and assent to the adjudication of the bankruptcy of the firm. This affects a compliance with Rule XVIII. Even though the latter petition prays for the adjudication of the bankruptcy of the firm, it may be regarded as simply giving assent to the adjudication under the first petition. Rule XVI does not apply to such a case. *In re Henry Lewis*, 1 B. R. 239; s. c. 2 Ben. 96; *in re Horace Hall*, 5 Law Rep. 269.

If the administrator of the deceased partner has given the necessary bond and taken charge of the partnership property, which he is administering in the probate court, the district court may, in its discretion, refuse to adjudge the partnership bankrupt. *In re Daggett et al.*, 8 B. R. 287; s. c. 8 B. R. 433; s. c. 3 Dillon, 83.

When one member of a firm files a petition praying for his discharge alone, his copartners residing in another district can not be permitted to join in the proceedings. This section only applies to a case where two or more persons who are partners are adjudged bankrupts. *In re Boylan*, 1 B. R. 2; s. c. 1 Ben. 266.

The case of two members of a firm constituting a separate firm under another name was not contemplated by this section, but its provisions, as applicable to the estate and debts of a single firm, and the separate property and individual debts of the members of such firm, are only declaratory of the acknowledged principles of equity upon which the court would marshal the assets in the absence of such provision. When the firm which embraces the members of such separate firm has been declared

bankrupt, it is improper to proceed to an adjudication against the separate firm while the former proceedings are pending. In *re Leland & Leland*, 5 B. R. 222; s. c. 5 Ben. 168; s. c. 1 L. T. B. 284; s. c. 4 L. T. B. 185.

When the partners reside in different districts, and have no place of business in the district where the petition is filed, the nonresident partner can not be adjudged a bankrupt upon his own petition until he shall have filed a petition in the district where he resides. In *re Prankard et al.*, 1 B. R. 297.

When there are partnership debts and partnership assets of an insolvent firm, the assignee of one of the partners may file a petition against the other members to have the firm adjudged bankrupt, and the partnership assets distributed by the bankruptcy court. If the other members of the firm deny the insolvency, they are entitled to have that issue tried by a jury, but in such cases, it is wholly unnecessary to show an act of bankruptcy on their part. When one member of the firm has asked for the benefit of the bankruptcy act, the question before the court becomes a purely legal one, and the firm must of necessity be adjudged bankrupt. In *re Grady*, 3 B. R. 227; in *re Greenfield*, 42 How. Pr. 469; s. c. 5 Ben. 552.

Unless the firm is declared a bankrupt, no member thereof can be discharged from the firm debts, because the theory and intent of this section and Rules XVI and XVIII are that the creditors of a firm shall be required to meet but once, and in one bankruptcy forum, all questions in regard to the bankruptcy of the firm. In *re Little*, 1 B. R. 341; s. c. 2 Ben. 186; in *re Bidwell*, 2 B. R. 229.

The bankrupt can not be discharged of a portion of his liabilities merely, but if discharged at all, he must be discharged of all of them, and this can not be unless the firm debts are paid, or the firm assets administered in the bankruptcy court. In *re Grady*, 3 B. R. 227.

This applies to partnerships actually existing, or where there are assets belonging to the firm, and not to partnerships terminated by bankruptcy, insolvency, assignment, or otherwise. In *re Winkens*, 2 B. R. 349.

Where there are no partnership assets to be administered, a member of a late partnership may, upon his individual petition, be discharged from all his debts, partnership as well as individual. In *re Abbe*, 2 B. R. 75; s. c. 7 A. L. Reg. 824.

Proceedings in voluntary bankruptcy can not be conducted in the united names of parties who have no common interest and do not seek a common decree. Individuals can not associate and make a joint and several petition with a view to a separate adjudication in favor of each applicant. A petition by two petitioners conjointly, when they can not petition as partners, can not avail them individually. In *re Moritz & Pinner*, 5 Law Rep. 325.

Persons can not join or be joined in a petition in bankruptcy who could not sue or be sued in any form of action at law or in equity. Distinct firms composed in part of different persons can not be so joined. In *re Wallace & Newton*, 12 B. R. 191.

No number less than the whole of a firm can file a voluntary petition: *In re Moritz & Pinner*, 5 Law Rep. 325.

The filing of a petition in bankruptcy by one partner against his copartner will not prevent the latter from bringing a suit on his individual claim, and prosecuting it to judgment. *Booth v. Meyer*, 14 B. R. 575; s. c. 3 W. N. 196.

While the proceeding by one partner against his copartner is pending, the district court may enjoin the latter from disposing of the firm assets, although he has been appointed receiver in a State court on a proceeding by him against the former. *In re Hathorn & Batchelor*, 2 Woods, 73.

Partners are not liable to be adjudged bankrupts upon the petition of their creditors, upon mere proof of their insolvency, without other proof of the commission of an act of bankruptcy. *In re Ralph Johnson*, 1 N. Y. Leg. Obs. 166; s. c. 5 Law Rep. 313; *in re John W. Hull*, 1 N. Y. Leg. Obs. 1. Contra, *in re Galbraith, Cromwell & Co.*, 1 N. Y. Leg. Obs. 5, note.

**Proceedings at First Meeting of Creditors.**—None but creditors of the firm can participate in the election of an assignee. *In re Phelps, Caldwell & Co.*, 1 B. R. 525; s. c. 2 L. T. B. 25; *in re Scheffer & Garrett*, 2 B. R. 591; s. c. 1 C. L. N. 261.

This section draws a distinction between the creditors of "the copartnership" and "the separate creditors" of each partner. It also calls the former "joint creditors," and speaks of the debts due to them as "joint debts," while it speaks of the debts due to such separate creditors as separate debts. It puts joint creditors and joint debts in antithesis, and separate creditors and separate debts. This it does, although necessarily the copartners are jointly and severally liable to the creditors of the copartnership for the joint debts. The separate debts must, therefore, be regarded as confined to debts which arise out of a liability other than, or in addition to, that resulting solely from a debt contracted by the firm. *In re Walter P. Long & Co.*, 9 B. R. 227; s. c. 7 Ben. 141.

A firm creditor who holds a firm note indorsed by one of the partners may elect to prove his debt against the separate estate of such copartners. *Stevenson v. Jackson*, 9 B. R. 255.

A creditor holding notes both of the partnership and of the individual partners for a partnership debt has the right to prove the notes against the respective makers, and is entitled to receive dividends from the joint and separate estates according to such proof. *Meade v. National Bank of Fayetteville*, 2 B. R. 173; s. c. 6 Blatch. 180; s. c. 1 L. T. B. 108.

Although by this section, where partners in trade shall be adjudged bankrupts, all the joint property of the partnership and also all the separate estate of each of the partners shall be taken, yet in the distribution the joint and separate estates are considered as distinct estates. This is perfectly clear by the rule laid down for their administration. It has, therefore, been held that a joint creditor having a security upon the separate estate is entitled to prove against the joint estate without giving up his security; he would, therefore, by the same principle, be allowed to prove his whole claim against both estates, and receive a dividend from each, but so as not to receive more than the full amount of his debt. A

creditor holding a note indorsed both by the firm and by one of the co-partners, may prove his claims against both estates. In *re Howard, Cole & Co.*, 4 B. R. 571; s. c. 2 L. T. B. 161; *Emery v. Canal National Bank*, 7 B. R. 217; s. c. 5 L. T. B. 419; *Meade v. National Bank of Fayetteville*, 2 B. R. 173; s. c. 6 Blatch. 180; s. c. 1 L. T. B. 108; in *re Bradley*, 2 Biss. 515; in *re Peter Farnum*, 6 Law Rep. 21.

If a dividend has been paid by one estate, the amount thereof should be deducted and a dividend only on the balance allowed from the other. In *re Peter Farnum*, 6 Law Rep. 21.

Although the consideration passed to the firm, yet if the obligation is given by the partners individually, and not by the firm name, the debt is provable against their individual estate. In *re Bucyrus Machine Co.*, 5 B. R. 303.

Where the partnership as such receives and uses the funds belonging to an estate of which one partner is the executor, with full knowledge of its character, it becomes liable therefor, and the beneficiaries may prove their claim either against the partnership estate or against the individual estate of the partner who was executor. In *re E. P. & E. M. Tesson*, 9 B. R. 378.

If a person takes the note of one partner without knowing that the money is for the benefit of the firm, he can not prove a claim against the firm after he has obtained a judgment on the note. In *re Hugh T. Herrick*, 13 B. R. 312.

A person who takes a note of one partner for money loaned for the use of the firm, can not prove a claim against the firm. *Ibid.*

Where the deposition on its face shows a several debt, the creditor can not be held to have proceeded against the joint estate, although the proof is in that form. *Ibid.*

A judgment against the partners individually and others constitutes a several debt as to the partners, and can not be proved against the joint estate. *Ibid.*

A creditor holding a partnership bond, by express terms joint and several, for a partnership debt, has the right to prove it against the separate estates, and is entitled to receive dividends out of the individual assets. In *re Bigelow et al.*, 2 B. R. 371; s. c. 3 Ben. 146; s. c. 2 L. T. B. 41.

A joint agreement given by two members of a firm to indemnify a retiring partner may be proved for the full amount against the separate estate of each partner. In *re Beers et al.*, 5 B. R. 211.

A bond signed by the members of a firm, in their individual names, as sureties, and not given for a partnership liability, is a claim against them individually, and not as members of the firm. In *re W. D. Webb & Co.*, 2 B. R. 614; s. c. 2 L. T. B. 87; s. c. 16 Pitts. L. J. 43; in *re Edmund H. Miller*, 1 N. Y. Leg. Obs. 38; in *re Roddin & Hamilton*, 6 Biss. 377.

Where one of the partners of a bankrupt firm is also a member of another firm, a claim by the latter against the former may be proved by the solvent partner, for the firms are regarded as distinct legal entities, capable of contracting with each other in equity. In *re Buckhause & Gough*, 10 B. R. 206.

When a partnership consists of two persons, and they both sign a note or bill with their individual names, and not by the name of the firm, or one draws a bill and the other accepts it, if it is in fact for a partnership object, it may be treated for all purposes as a partnership debt. *In re Henry Warren*, 2 Ware, 322.

When the intention of the contracting parties is that the firm shall be bound, and the contract is within the scope of the partnership business, the contract will bind the firm in whatever form it may be made, whether signed by the partners jointly, or with the firm name, or by one partner alone. *In re Henry Warren*, 2 Ware, 322.

The presumption that arises from the form of the note, that the separate name of the partner was taken from choice, may be overcome by proof that no such election was made. *Ibid.*

A creditor who takes the individual note of one partner in a transaction for the benefit of the firm is presumed to elect to take that in preference to the firm note. *Ibid.*

The assignee of the firm is the assignee of a member of the firm, and may sue to recover money due to him. *Babbitt v. Burgess*, 7 B. R. 561; *s. c.* 2 Dillon, 169.

An assignee of a firm may recover property transferred by one partner in violation of the bankruptcy law. *Barnwell v. Jones*, 14 B. R. 278.

**Assignee of Individual Partner.**—An adjudication upon the petition of one partner in his own behalf, and as a member of a firm, does not pass the partnership effects to his assignee. *In re Paulson*, 1 N. Y. Leg. Obs. 6, cited.

Upon the bankruptcy of one partner, his private property and his interest in the funds of the firm pass to his assignee. *Harrison v. Sterry*, 5 Cranch, 280; *s. c.* Bee, 244.

The assignee of a bankrupt partner and the remaining solvent partner, are tenants in common in respect to the partnership funds, and, like all tenants in common, one party can not call the joint property out of the hands of the other. They are entitled equally to the possession in law. Neither party is strictly entitled, as against the other, to anything more than his share of the surplus after the partnership debts are paid. *Murray v. Murray*, 5 Johns. Ch. 60; *Ayer v. Brastow*, 5 Law Rep. 498; *in re Shannahan & West*, 6 Biss. 39.

Where partners agree to give another an interest in the assets after the payment of the firm debts, the latter, upon the bankruptcy of the former, is not entitled to receive the property from their assignee until the debts are paid. *In re Shannahan & West*, 6 Biss. 39.

The solvent partner has generally the right to retain the control and possession of the partnership assets until an account is taken for the purpose of applying them in good faith to the discharge of the joint debts and for his share of the surplus. *Ayer v. Brastow*, 5 Law Rep. 498; *Talcott v. Dudley*, 5 Ill. 427.

The solvent partner, upon the dissolution of the partnership by bankruptcy, being a tenant in common, may retain and distribute the funds in his possession, and may sell the partnership effects for a valuable con-

sideration and without fraud. They can not be called out of his possession by his cotenant. But, on the other hand, there is no foundation in law or equity for the solvent partner to call to account either the partnership debtors who have bona fide settled with the assignee, or the assignee himself for the funds in his possession. *Murray v. Murray*, 5 Johns. Ch. 60.

The only interest in partnership property which passes to the assignee of an individual partner, is the interest which the bankrupt may appear to have on taking an account. But the interest of the bankrupt does not pass to the assignee with precisely the same powers over the property which the bankrupt himself had. Before the bankruptcy, his power over it was that of a partner; it was a joint tenancy. The bankrupt could dispose of the whole property. But, by the bankruptcy, the partnership is dissolved, and the joint tenancy severed. The assignee succeeds to the rights of the bankrupt, not as a partner, but as a tenant in common. *Ayer v. Brastow*, 5 Law Rep. 498.

Without a special order of the court for that purpose, the assignee of an individual partner has no power to take and dispose of the assets of the firm so as to divest the rights of the other partners and vest the entire interest in the assets of the firm in a purchaser at his sale. *Buckner v. Calcote*, 28 Miss. 432.

Where one partner becomes bankrupt, the district court may take into its own hands the exclusive management and administration of all the partnership assets and inhibit the other partners from intermeddling therewith for the purpose of ascertaining the partnership assets and debts, and adjusting and distributing the same, but will do so with caution. *Parker v. Muggridge*, 2 Story, 334; *Ayer v. Brastow*, 5 Law Rep. 498; *McLean v. Ihmsen*, 1 West. L. J. 189.

A creditor who has obtained a judgment against the ostensible partner may levy on the firm goods, although they are placed in the possession of the assignee of the dormant partner prior to the levy, but after the issuing of the execution. *Talcott v. Dudley*, 5 Ill. 427.

If one partner, who owns all the property, is declared a bankrupt, his assignee will be estopped from denying that his copartner had all the usual rights of a partner as against an attaching creditor of the firm. *Kelly v. Scott*, 49 N. Y. 595.

The appropriation of the firm property to pay an individual debt of one partner, where he becomes a bankrupt, does not bind the firm unless the solvent partners assent to it prior to the commencement of the proceedings in bankruptcy. *Anshutz v. Fitzsimmons*, 9 Penn. 180.

The assignee of a liquidating partner is merely a mandatory of the interest of the other partner for purposes of liquidation, and a purchaser from him will not acquire that interest. *Akin v. Oakley*, 10 Rob. (La.) 410.

The assignee of an individual partner does not, by virtue of the interest he takes in the firm, acquire any claim against the bankrupt. *Buckner v. Calcote*, 28 Miss. 432.



Where one partner becomes bankrupt, his assignee can take only that portion of the partnership assets which would belong to the bankrupt after payment of all the partnership debts, and the solvent partners have a lien upon the partnership assets for all the partnership debts, and also for their own shares. *Parker v. Muggridge*, 2 Story, 334.

The assignee of an individual partner, who is a member of three firms composed of the same individuals, can only claim what may be due after the payment of all the debts of the firms, and upon an account of the respective interests of the partners *inter se*. *Buckner v. Calcote*, 28 Miss. 432.

Where an individual partner applies alone and surrenders partnership assets, a sale by his assignee will pass the entire interest of the firm. *Judson v. Lathrop*, 6 La. An. 587.

If the assignee of the bankrupt partner settles with the partnership debtor, the solvent partner can not set aside such settlement in order to obtain possession of what was due from the debtor for the purpose of distribution, inasmuch as the assignee had competent power to make the settlement and to obtain possession of what was due and coming from the settlement for the like purpose of distribution. *Murray v. Murray*, 5 Johns. Ch. 60.

The assignee of one partner may become a party on the record with the other partner of his assignee when the suit is prosecuted to collect a demand due to the firm. *Cannon v. Wellford*, 22 Gratt. 195.

Where the partnership is insolvent, so that the assignee of an individual partner has no interest in the effects of the firm, the assignee need not be made a party to a suit in equity to obtain payment of a debt due to the firm. *Coe v. Whitbeck*, 11 Paige, 42.

Where one partner becomes bankrupt, a suit on a cause of action belonging to the firm should be brought in the name of the solvent partner and the assignee. *Peel v. Ringgold*, 6 Ark. 546; *Coe v. Whitbeck*, 11 Paige, 42; *Halsey v. Norton*, 45 Miss. 703.

But it must be shown that there is another person not coplaintiff who ought to be joined. This may be by a plea in abatement, or by nonsuit, if proved at the trial, or by demurrer, if it appears on the face of the declaration. If the nonjoinder of the solvent partner is relied on to nonsuit the assignee, the defendant must prove the existence of such a partner. *Halsey v. Norton*, 45 Miss. 703.

If upon the declarations of the firm one partner takes the firm assets and undertakes to pay the firm debts, and the retiring partner subsequently pays firm debts to an amount more than sufficient to cover the deficiency that might remain after applying the joint assets to pay the joint debts, the assignee of the latter is entitled to the surplus of the firm assets in the hands of the former. *Hyde v. Baker*, 11 Pac. L. R. 81.

There must be an adjudication of bankruptcy against the partners composing the firm, and an assignee must be appointed in such a proceeding before any step can be taken to reach the partnership assets in bankruptcy. The partnership property can not be taken and administered by the bankruptcy court unless all the persons who have an interest as copartners in such property are adjudged bankrupt. An assignee of the individual and

separate estate of one partner has no title to call third parties to an account for partnership property. The court does not intend to decide what the right of the assignee would be to set aside a transfer of the bankrupt's interest in the joint property. In *re T. S. Shepard*, 3 B. R. 172; s. c. 3 Ben. 347; *Forsalith v. Merritt*, 3 B. R. 48; s. c. Lowell, 336; s. c. 1 L. T. B. 168; *Withrow v. Fowler*, 7 B. R. 339; s. c. 5 Pac. L. R. 102; *Amsinck v. Bean*, 8 B. R. 228; s. c. 11 B. R. 495; s. c. 10 Blatch. 361; s. c. 22 Wall. 395.

The assignee of an individual partner can not maintain an action to recover money of the firm secretly paid to a firm creditor, in fraud of the rights of other creditors, under a compromise. *Amsinck v. Bean*, 8 B. R. 228; s. c. 11 B. R. 495; s. c. 10 Blatch. 361; s. c. 22 Wall. 395.

**Distribution of Assets.**—This section was inserted simply to indicate the correct and equitable mode of administration of the partnership property and separate estates of each partner when two or more persons who are partners in trade shall be adjudged bankrupt, and can not be made to apply to a case where only one of the partners is proceeded against. In its main features it embodies no new law, but was only declaratory of the equitable principles which the courts had adopted in the distribution of the bank's assets. It was, nevertheless, proper and useful in this respect—that it put to rest the long-mooted and much-discussed question of the power of the bankruptcy court, in administering the bankrupt's estate, to make orders for the marshaling of assets and the payment of partnership debts with partnership funds, and separate debts with separate funds, without the intervention of proceedings by bill in equity. In *re Melick*, 4 B. R. 97; *Collins v. Hood*, 4 McLean, 186; in *re Collier*, *Taylor & Co.*, 12 B. R. 266; *Ancker v. Levy*, 3 Strobb. Eq. 197.

The rule applies only where the joint estate as well as the separate is before the court for distribution, and where there are joint creditors and also separate creditors. *Lewis v. U. S.*, 13 B. R. 33; s. c. 14 B. R. 64; s. c. 92 U. S. 618; in *re R. S. Pease*, 13 B. R. 168.

In the distribution of the estate, it is of no consequence, excepting in the matter of expense, whether there are two proceedings by or against two partners or only one. Everything is conducted in the same way, and the rights of creditors and all others are precisely the same. In *re Edward P. Morse*, 13 B. R. 376.

Where one partner goes into bankruptcy alone, the separate creditors are entitled to be paid solely out of the separate estate, and the partnership creditors are entitled solely to be paid out of the partnership estate. In *re William Ingalls*, 5 Law Rep. 401; in *re Henry B. Williams*, 5 Law Rep. 402.

Premises used by partners for the purpose of carrying on their trade are prima facie a part of the partnership property. *Osborn v. McBride*, 16 B. R. 22; s. c. 3 Saw. 590.

Real estate held as partnership assets does not lose that character until it is shown not only that the firm creditors have been paid, but that as between themselves the accounts of the partners have been settled. *Hiscock v. Green*, 12 B. R. 507.

If real estate is purchased as a speculation in which the capital is to be derived from and the losses sustained by the assets of the firm, and the profits which may accrue are to augment the capital of the firm, it will be deemed to be partnership assets. *Ibid.*

If a partner, after a formal dissolution, continues to carry on business under the firm name, with the consent of his copartner, his trade assets should be treated as joint assets. *In re Edward P. Morse*, 13 B. R. 376.

Where an individual partner is bankrupt, a partnership creditor who has received a payment in part from the firm assets held by the copartners, may prove his debt for the balance, and share pro rata with the individual creditors. *In re R. S. Pease*, 13 B. R. 168.

When a partner takes all the firm property and stipulates to pay all the firm debts, he makes those debts his individual debts, and the creditors of the partnership may prove their debts against him alone, and share in his separate estate pro rata with his individual creditors. By this promise he is bound, and the creditors of the firm are in equity entitled to enforce it against him. It is, on their election to avail themselves of it, cumulative to their other rights. They need not release the firm in order to get the benefit of this promise made by one of the members for their benefit. The right of the creditors is not defeated by his subsequent bankruptcy. They may assent to and claim the benefit of it at any time, either before or after the bankruptcy of the debtor. *In re Wm. Downing*, 3 B. R. 748; *s. c.* 1 Dillon, 33; *s. c.* 1 L. T. B. 207; *in re George Rice*, 9 B. R. 373; *in re Walter P. Long & Co.*, 9 B. R. 227; *s. c.* 7 Ben. 141; *in re Collier, Taylor & Co.*, 12 B. R. 266.

An agreement between two traders to unite their stocks in trade, as the capital of a partnership to be formed between them, and to convert the separate debts of either into joint debts of the firm, will not entitle a separate creditor, who has not acceded in any way to the arrangement, to prove in bankruptcy as a joint creditor of the firm. *In re Isaacs & Cohen*, 6 B. R. 92; *s. c.* 3 Saw. 35.

If partners divide the firm property on a dissolution, and one partner puts his share into a new firm, the assignee of the last firm is entitled to have it first applied toward the payment of the partnership debts, as against a creditor of the prior firm who has levied an execution thereon. *Crane v. Morrison*, 13 Pac. L. R. 81.

When there is no joint estate and no solvent partner, all the creditors, joint and separate, will share *pari passu* in the estate of the bankrupt partner, in case of his separate application for the benefit of the bankruptcy act. Under such circumstances, the creditors of the firm have a right to prove their debts against the estate of the bankrupt partner, and are entitled to share pro rata under section 5091, as it extends to "all creditors whose debts are duly proved," and are embraced in the discharge provided for in section 5119. In other words, this section of the bankruptcy act only comes into operation when there are firm assets, and the proceedings are instituted against the firm and each of its members, in which case the assets are to be marshaled according to the equity rule, firm creditors to have priority as respects the joint assets, and individual creditors as

respects the separate estate of their debtor. In *re Wm. Downing*, 3 B. R. 748; s. c. 1 Dillon, 33; s. c. 1 L. T. B. 207; in *re Fred'k Jewett*, 1 B. R. 491; s. c. 7 A. L. Reg. 291; s. c. 15 Pitts. L. J. 354; in *re Goedde & Co.*, 6 B. R. 295; in *re George Rice*, 9 B. R. 373; in *re Knight*, 8 B. R. 436; s. c. 2 Biss. 518; in *re William Mills*, 11 B. R. 74; *Tucker v. Oxley*, 5 Cranch, 34; s. c. 1 Cranch C. C. 419. Contra, in *re Byrne*, 1 B. R. 464; s. c. 7 A. L. Reg. 499; in *re Frear*, 1 B. R. 660; s. c. 35 How. Pr. 249; s. c. 2 Ben. 467.

In order to share in the separate estate, there must be absolutely no joint estate. If there is any, however small, the joint creditors can not be allowed to receive dividends from the separate estate. In *re Albert Marwick*, 2 Ware, 233; s. c. 3 N. Y. Leg. Obs. 286; in *re Elijah E. Smith*, 13 B. R. 500.

The rule covers all cases where there is a joint fund, without regard to its origin. A separate creditor may, therefore, purchase a worthless asset belonging to the joint fund for a small sum in order to defeat the right of the joint creditors to share in the separate estate. In *re Albert Marwick*, 2 Ware, 233; s. c. 3 N. Y. Leg. Obs. 286.

Where there are partnership assets, the partnership creditors can not share in the individual estate although the partners were declared bankrupts on separate petitions. In *re Edward P. Morse*, 13 B. R. 376.

Where there are assets of a firm and of the individual members thereof, each estate must pay its proportion of the entire expenses of administering the estate: In *re Elijah E. Smith*, 13 B. R. 500; in *re William Ingalls*, 5 Law Rep. 401.

If the firm assets are only sufficient to pay the cost of the proceedings, the firm creditors may share in the individual estate, for the words "net proceeds" refer to the estate to be distributed among the creditors, and were only designed to exclude one class in case there were some funds for distribution in the class to which such creditors belonged. In *re McEwen & Sons*, 12 B. R. 11; s. c. 6 Biss. 294.

Where the firm is in bankruptcy, the firm creditors may share *pari passu* with the separate creditors in the separate estate if there are no joint assets. In *re Collier, Taylor & Co.*, 12 B. R. 266.

The burden of proving that there is a joint fund rests upon the individual creditors. The partnership creditors can not be required to prove a negative. In *re Frederick Jewett*, 1 B. R. 491; s. c. 7 A. L. Reg. 291; s. c. 15 Pitts. L. J. 354. Contra, in *re Byrne*, 1 B. R. 464; s. c. 7 A. L. Reg. 499.

The court will not presume that the other partner is solvent and has property that can be reached by the joint creditors. His pecuniary responsibility is a matter of affirmative proof by the individual creditors who object to the firm creditors sharing in a dividend from the bankrupt's estate. In *re George Rice*, 9 B. R. 373.

If a petition is filed against a firm, and an adjudication is thereupon entered against the firm and one partner, but no adjudication is entered against the other partner, the separate creditors of the partner so declared bankrupt can not participate in the firm assets. An adjudication against the other partner can only be necessary for the purpose of reaching

his individual property, and may be made at any subsequent time, if it becomes necessary in the course of the proceedings. In *re Kinkead*, 7 B. R. 439; 3 Biss. 405.

When partners are in fact insolvent, they are considered in equity as holding the partnership effects in trust for the benefit of the firm creditors, and they can not, by a transfer of the interest of one to the other, defeat this trust. A sale by one partner to his copartner when the firm is insolvent and upon the eve of bankruptcy, which, if upheld, would operate to apply the property of the retiring partner to the payment of the individual debts of the partner purchasing, is presumptively fraudulent as to firm creditors, and the court will set aside such sale, and distribute the property as firm property to the payment of the firm debts. If the legal effect of such transfer is to change the order of payment and prefer certain creditors, the private creditors over the firm creditors, it will be void as creating a preference. In *re Cook & Gleason*, 3 Biss. 116; *Collins v. Hood*, 4 McLean, 186.

If a transfer of the firm property to one of the copartners is made honestly and in good faith upon a dissolution, and for a valuable consideration, and without any fraud or collusion between the copartners to defeat the rights of the joint creditors, the joint property becomes by such transfer the separate property of such copartner. In *re Walter P. Long & Co.*, 9 B. R. 227; s. c. 7 Ben. 141.

When only five days had intervened between the dissolution of the firm and the commencement of proceedings in bankruptcy, the transfer of the partnership property was held to be void, as a fraud on the copartnership creditors, and the property so transferred was held to be a joint fund. In *re Byrne*, 1 B. R. 464; s. c. 7 A. L. Reg. 499.

When firm property has been transferred to a partner under an agreement to apply the proceeds of the same to the payment of the firm debts, and he has purchased other property, and mingled it with the firm property in such a manner as to make it impossible to distinguish between them, the whole should be regarded as his individual property, and liable, in the first instance, to his individual debts. In *re H. B. Montgomery*, 3 B. R. 374; s. c. 3 L. T. B. 40.

The separate estate of a partner is that in which he is separately interested to the exclusion of his copartners. If the interest of each partner extends to the entire stock in trade, the excess of the interest of one partner over that of the other partners is not the former's separate estate. In *re Lowe & Richards*, 11 B. R. 221.

If the surviving partner, with the knowledge and consent of the administrator of the deceased partner, converts the firm assets to his own use, the property belongs to his individual estate. In *re William Mills*, 11 B. R. 74.

If one partner in good faith sells the partnership property to his copartner, who agrees to pay the firm debts, the property from the moment of sale ceases to be partnership property, and becomes the individual property of the purchasing partner, and primarily liable for the payment of his individual debts. In *re William H. Wiley*, 4 Biss. 214.

When the bankrupt has been a member of two separate firms, the property of each firm must be applied to the payment of its own debts in preference to the debts of the other firm. No part of the proceeds of such property can be applied to the latter debts until the former are fully paid. *In re Hinds et al.*, 3 B. R. 351.

If any surplus remains after the individual creditors are paid, it must be distributed pro rata among all the creditors who have proved their claims and to whom the partner was liable either as a member of the bankrupt firm or any other firm. *In re Robert K. Dunkerson & Co.*, 12 B. R. 391; s. c. 4 Biss. 323.

If a partner is a member of two distinct firms, both of which are liable to a creditor on commercial paper, the creditor has no advantage over the creditors of either firm in the distribution of his individual estate. *In re Robert K. Dunkerson & Co.*, 4 Biss. 227.

If the partners conduct business in two different places under different names, the two firms, in the distribution of the assets, will be treated as one firm, and no notice will be taken of the indebtedness of one firm to the other. *In re Theo. H. Vetterlein et al.*, 4 B. R. 599; s. c. 5 Ben. 311; *Buckner v. Calcote*, 28 Miss. 432; *Ballin v. Ferst*, 55 Ga. 546. *Vide in re Buckner & Co.*, 28 Miss. 447, note.

If one of the bankrupts is a member of a firm which is a creditor, the whole dividend should not be paid to the firm, but the proportion to which the bankrupt would be entitled should be retained for his individual creditors, and the rest paid to the other members of the firm. *In re Joel A. H. Ellis*, 5 Ben. 421.

The firm creditors can not have recourse to the separate estate for money advanced by the firm to one of the partners. *In re G. H. Lane & Co.*, 10 B. R. 135; *in re McEwen & Sons*, 12 B. R. 11; s. c. 6 Biss. 294; *in re John McLean & Son*, 15 B. R. 333.

The firm creditors can not have recourse to the separate estate for goods sold by the firm to one of the partners. *In re G. H. Lane & Co.*, 10 B. R. 135.

The amount which a firm is entitled to prove against a copartner, is the balance that remains after deducting the partner's share of the profits. *In re Jay Cooke & Co.*, 12 B. R. 30.

If a creditor, having a firm note indorsed by a partner and holding property of the partner as security, obtains payment by the sale of a security, the separate creditors are entitled to receive from the joint estate a sum equal to the dividend on the note. *In re Norman B. Foote et al.*, 12 B. R. 337.

If the holder of a firm note indorsed by one partner resorts to the separate estate, the separate creditors are entitled to be substituted in the place of the holder of the note, and allowed to prove the note against the joint estate. *Ibid.*

Real estate purchased with the intention that it shall be held as partnership property, will be deemed to be personalty so far as creditors are concerned, and will be applied to pay firm debts, even as against individual creditors who have obtained judgments which would otherwise be liens thereon. *Marrett v. Murphy*, 11 B. R. 131; s. c. 1 Cent. L. J. 554.

If partners purchase land with partnership funds, and take a deed to themselves jointly as tenants in common, and the orphans' court, upon the death of one of them, orders his interests in the land to be sold, the proceeds do not belong to the assignee of the surviving partner. What was sold was the estate of the decedent, and not that of the partnership. The money is the proceeds of his estate. Whether the sale was of a moiety of the lands, the title of the decedent as a tenant in common, or his interest as a partner in the firm, the result is the same, and the assignee has no right to the money. *Jones' Appeal*, 70 Penn. 169.

A creditor holding a judgment against one partner acquires no lien upon firm property transferred to that partner at a time when the firm is insolvent. *In re Cook & Gleason*, 3 Biss. 122.

If the judgment of a partnership creditor against the firm is prior in point of time to the judgment of an individual creditor against one of the partners, the share which the partnership creditor is entitled to receive out of the partnership assets must be first applied as a credit on his judgment against the separate partner, in relief of the fund of such separate partner, for the benefit of the separate creditor. *In re A. T. Lewis*, 8 B. R. 546.

When a judgment has been obtained by a partnership creditor against the members of the firm, it operates as a several lien against the real estate of each partner, and if prior in point of time to a judgment obtained against an individual partner by an individual creditor of such partner, is to be preferred to such subsequent judgment. *Ibid*.

A creditor who holds a judgment against all the partners, rendered on a firm note, is not entitled to a dividend out of the separate estate of each partner on an equal footing with the separate creditors. *In re Berrian et al.*, 44 How. Pr. 216; s. c. 6 Ben. 297.

The assignee may settle an indebtedness of the partnership by cancelling a debt due from the creditor to the separate estate of one of the partners, and placing the sum to the proper account. If the claim is disputed, the assignee may retain in his possession as much of the proceeds which would otherwise belong to the creditor of the partnership as may be necessary to satisfy the debt due from the partnership creditor to the separate estate of one of the members. *In re Atkinson & Kellogg*, 10 B. R. 535; s. c. 7 C. L. N. 9.

- The rule that appropriates partnership property to the payment of partnership debts is for the benefit of the partners, and they may waive it. A mortgage is not void as against partnership creditors, because the notes or debts which it was in fact given to secure were individual debts of the respective partners, and not properly a partnership demand. *In re Kahley et al.*, 4 B. R. 378; s. c. 2 Biss. 383.

The presumption is, that an arrangement made by one partner to sell firm property, and, in consideration thereof, to receive goods for his own individual use, is entered into by both parties in fraud of the partnership. This presumption may be rebutted by showing an express or implied assent of the other partners, but without such proof the arrangement is void. *Taylor v. Rasch*, 5 B. R. 899.

A member of a firm may assign his interest in the existing assets of the firm, subject to the claims of the creditors of the firm and of the other partners. The fact that the mortgagor purchased other goods after the making of the mortgage, and mingled them with mortgaged goods, is not material, when the proceeds of the property actually mortgaged are more than the sum claimed by the mortgagee. The mortgagor can not, by such an act, in any way affect the title of the mortgagee. *Thompson v. Spittle*, 102 Mass. 207.

The fact that a note secured by a mortgage is also secured by the signature of a surety who gave the payee a mortgage of his property as additional security, imposes no obligation on the payee of the note to resort to him. He has a right to resort to the principal debtor and to the security obtained from him. Against the surety the unsecured creditors have no superior equity. *Ibid*.

If the separate estate of one partner is more than enough to pay his separate debts, at the amounts proved as they stood at the time of the adjudication of bankruptcy, the surplus of such separate estate over such debts is to be added to the partnership estate, and applied to the payment of joint debts, before paying interest on the separate debts after that time. *In re Berrian et al.*, 44 How. Pr. 216; s. c. 6 Ben. 297.

A former partner of the bankrupt will not be allowed to receive a dividend on notes given to him by the bankrupt for his share in the firm at the time of the dissolution thereof until the joint creditors are paid in full. *In re Frederick Jewett*, 1 B. R. 495; s. c. 7 A. L. Reg. 294.

**Discharge.**—Upon an application for a discharge, there are in reality two cases, and the petition of each partner for a discharge, and the objections made to it, must be considered severally. Each bankrupt must stand or fall by his own acts. Those of his copartner, committed without his knowledge, will not affect him, excepting that a neglect to do what the law positively requires, such as keeping proper books, will affect both, though it should actually be the neglect of one only. *In re George & Proctor*, Lowell, 409; *in re George M. Garwood*, Crabbe, 516.

Specifications which apply to one partner alone will not prevent the discharge of the other partners. The discharge is to be granted or refused to them the same as it would be if the defaulting partner were not a party to the proceedings. *In re Seofield et al.*, 3 B. R. 351.

The question whether the bankrupts were partners or not, at the time of the commencement of proceedings in bankruptcy, will not be entertained on the hearing of their petition for a discharge. *In re Gilbert & Lamphier*, 1 N. Y. Leg. Obs. 327.

**Proceedings where Partners Reside in Different Districts.**—This section applies only to a case where two or more persons who are partners are adjudged bankrupts. The clause which provides that where "such copartners reside in different districts, that court in which the petition is first filed, shall retain exclusive jurisdiction over the case," means that where two or more petitions are filed in different districts, praying that two or more persons who are partners be adjudged bankrupt, the court in which the first in order of time is filed shall have exclusive jurisdiction



to do what this section allows and adjudges bankrupts. In *re Boylan*, 1 B. R. 2; s. c. 1 Ben. 266; in *re M. C. Smith*, 1 B. R. 214.

This provision implies that the court which first obtains jurisdiction over the subject-matter of the petition and over the person of the petitioner, shall have exclusive jurisdiction over the case; that is over the subject-matter of the petition and over all the copartners, if the nonpetitioning copartners are brought in by appropriate process. In *re Penn et al.*, 5 B. R. 30; s. c. 5 Ben. 89; s. c. 2 L. T. B. 190.

One partner can not file a petition against his copartners in the district where he resides, but in which they have neither resided nor carried on business during any portion of the six months next preceding the filing of the petition. In *re Work, McCough & Co.*, 30 Leg. Int. 361. Contra, in *re Penn et al.*, 5 B. R. 30; s. c. 5 Ben. 89; s. c. 2 L. T. B. 190.

Where the members of a firm reside in different districts, the only court that has jurisdiction of a petition against the firm, is the district court of the district in which the firm carries on business. *Oameron v. Canleo*, 9 B. R. 527; in *re Horace Hall*, 5 Law Rep. 269.

If proceedings to have the firm declared bankrupt, are commenced in one district on the same day that proceedings in bankruptcy are commenced by one of the partners in another district, the assignee elected in the former proceedings is alone the proper assignee of the firm. *Cannon v. Wellford*, 22 Gratt. 195.

By the commencement of proceedings to have a firm declared bankrupt, the district court obtains jurisdiction of both partners, and a subsequent proceeding by one partner in another district is void. *Ibid.*

When each partner files a separate petition in distinct and separate courts, the partnership property will not vest in the assignee of either court. The proceedings in the court where the latest petition was filed are void. In *re Greenfield*, 42 How. Pr. 469; s. c. 5 Ben. 552.

An adjudication against a member of a firm in one district does not prevent a subsequent adjudication against the firm in another district. In *re Jewett & Co.*, 15 B. R. 126; s. c. 16 B. R. 48; s. c. 9 C. L. N. 345.

#### ACT OF 1898, CH. 1, SEC. 1, \* \* \*. Corporations, Meaning of.—

(6) "Corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association.

#### THE SAME, CH. 2, SEC. 2. \* \* \*. Punishment of Corporations.—

(4) Arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors, or trustees, or other similar controlling bodies, of corporations for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States.

**ACT OF 1867, § 5122.** The provisions of this Title shall apply to all moneyed, business or commercial corporations and joint stock companies, and upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor of such corporation or company, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors. All the provisions of this Title which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporation or company, in relation to the same matters concerning the corporation or company, and the money and property thereof. All payments, conveyances, and assignments declared fraudulent and void by this Title when made by a debtor shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. Whenever any corporation by proceedings under this Title is declared bankrupt, all its property and assets shall be distributed to the creditors of such corporation in the manner provided in the Title in respect to natural persons. But no allowance or discharge shall be granted to any corporation or joint stock company, or to any person or officer or member thereof.

Statute revised — March 2, 1867, ch. 176, § 37, 14 Stat. 535.

**Construction.**—Only such portions of the bankruptcy system as are expressly or impliedly adopted by this section are applicable to corporations or joint-stock companies. *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 13 B. R. 385; s. c. 10 B. R. 355; s. c. 64 Barb. 435; s. c. 53 N. Y. 123; s. c. 91 U. S. 656.

**What Corporations.**—A corporation created for the purpose of carrying on or pursuing any lawful business defined by its charter, and clothed with power so to do for the sake of gain, is clearly a business corporation, and amenable to the provisions of the bankruptcy act. *Rankin & Pullen v. Florida, Atlantic & G. C. R. R. Co.*, 1 B. R. 647; s. c. 1 L. T. B. 85.

Public corporations created for municipal or political purposes, and such private corporations as are ecclesiastical or eleemosynary, or established for the advancement of learning, are clearly not made subject to the provisions of the act. The words, "moneyed, business, or commercial corporations," are intended to embrace all those classes of corporations that deal

in or with money or property in the transactions of money, business, or commerce, for pecuniary gain, and not for religious, charitable, or educational purposes. The attempt to limit the word "business" so as to be merely synonymous with trading, would deprive it of its meaning beyond that included in the other words, "moneyed," and "commercial." A trading corporation is a commercial corporation. The word "business" has a broader meaning as applied to corporations. A railroad corporation is chartered to conduct the business of a common carrier, and is subject to the provisions of the act. If the whole interest does not belong to the government, or if the corporation is not created for the administration of political or municipal power, the corporation is private. The question whether railroad corporations are subject to be dealt with under the provisions of the bankruptcy act is not one of which the solution is dependent upon the special provisions of the statutes of the several States regulating the transfer of the corporate property or franchises, or the mode of applying them to the payment of the corporate debts. As the system of bankruptcy is to be uniform throughout the United States, the solution of this question must depend upon the construction of the terms of the act itself, and not upon the particular legislation of the several States. *Adams v. Railroad Co.*, 4 B. R. 314; s. c. 6 A. L. Rev. 365; s. c. 1 Holmes, 30; *Sweatt v. Railroad Co.*, 5 B. R. 234; s. c. 1 L. T. B. 273; in re *Southern Minn. R. R. Co.*, 10 B. R. 86. Contra, *Tucker v. Opelousas & Great Western R. R. Co.*, 3 B. R. (quarto) 31.

Railways are created for the purpose of carrying passengers and freight, and they are everywhere regarded as common carriers, when engaged in transporting merchandise and the baggage of their passengers. Steamship and steamboat companies, when incorporated and engaged in accomplishing the purpose for which they are created, and canal corporations not of a public character, are undoubtedly commercial corporations. Created as railways are for the same general purpose as the other corporations named, they are legally known by the same denomination, and are properly included in the same classification. All such corporations contract immense amounts of business, and may, perhaps, in view of that fact be well enough called business corporations, but their true legal and constitutional denomination is that of commercial corporations, as they are created for the purpose of transporting passengers and freight, which is a commercial business, as it involves intercourse and an interchange of commodities. Every corporation which transacts business for gain as its chief and ultimate purpose is, in a general sense, a business corporation. The word business as applied to corporations has a broader meaning than the word commercial as used in the same clause, but it was not the intention of Congress to give such a scope to the word business as to supersede the words moneyed and commercial, and leave them without any practical signification. Railways are private corporations just as much as steamship and steamboat companies, or canal corporations, where the stock belongs to the corporators, or as much as moneyed, manufacturing or business corporations. Doubtless some such corporations are more convenient and useful than others, but the question is not affected by

the degree of importance which attaches to the corporation. *Sweatt v. Boston R. R. Co.*, 5 B. R. 234; s. c. 1 L. T. B. 273; *Ala. & Chat. R. R. Co. v. Jones*, 5 B. R. 97; *Winter v. R. R. Co.*, 7 B. R. 289; s. c. 2 Dillon, 487; in *re Greenville & Col. R. R. Co.*, 6 A. L. J. 422; s. c. 5 C. L. N. 124; in *re California Pacific R. R. Co.*, 11 B. R. 193; s. c. 3 Saw. 240.

The business of insurance is included within the definitions of the section. In *re Merchants' Ins. Co.*, 6 B. R. 43; s. c. 3 Bliss. 162; s. c. 2 L. T. B. 243.

Inasmuch as the general bankruptcy law has not yet expressly repealed the specific provisions relating to the administration of the affairs of insolvent national banks, and does not necessarily contradict them, it must be presumed that it was the intention of Congress to except this class of corporations from the operations of the law. *Smith v. Manuf. Nat'l. Bank*, 9 B. R. 122; s. c. 5 Bliss. 490.

The jurisdiction of the bankruptcy court is not ousted because the State is a creditor. In *re Greenville & Col. R. R. Co.*, 6 A. L. J. 422; s. c. 5 C. L. N. 124.

**Voluntary Petition.**—No other petition on behalf of the corporation can be recognized under the act than one which has been duly authorized by a vote of a majority of the corporators at a legal meeting called for the purpose. A "corporator," as understood both in the law respecting corporations and in common speech, is one who is a member of a corporation; that is to say, one of the constituents or stockholders of the corporation. Congress has power to prescribe the conditions upon which the benefits of the act may be attained, and the mode of procedure for their attainment, and when prescribed, these conditions must be complied with. The action of a board of trustees which, by the laws of the State, has the management of the ordinary business of the corporation, can not be regarded as the action of the corporators. The corporators themselves must act in a meeting called for that purpose. In *re Lady Bryan Mining Co.*, 4 B. R. 144, 394; s. c. 2 Abb. C. C. 527; s. c. 1 Saw. 349; *Ansonia Brass Co. v. Chimney Co.*, 10 B. R. 355; s. c. 13 B. R. 385; s. c. 64 Barb. 435; s. c. 53 N. Y. 123; s. c. 91 U. S. 656.

The only fair and reasonable construction of the words "majority of the corporators" is to so interpret them as that the holders of a majority of the shares of the capital stock may authorize the filing of a petition. When a corporation seeks to avail itself of the provisions of the bankruptcy act, it can do so only in the mode prescribed by the act, and the petition in bankruptcy can only be filed by authority of the corporators holding a majority of the shares of stock, given at a legal meeting called for that express purpose. Where the commencement of proceedings was unauthorized and void, no subsequent ratification by the corporators can make the proceedings valid. It is not a matter of agency but of jurisdiction. In *re Lady Bryan Mining Co.*, 4 B. R. 144, 394; s. c. 2 Abb. C. C. 527; s. c. 1 Saw. 349.

Where all practicable measures have been taken to have a fair stockholders' meeting, the vote will be deemed sufficient although there was an irregularity in the call on account of the contumacy of some of the directors. *Davis v. Railroad Co.*, 13 B. R. 258; s. c. 1 Woods, 661.

If a stockholder dies intestate and no letters of administration are taken out on his estate, his stock can not be counted. *Freeman's Nat'l. Bank v. Smith*, 13 Blatch. 220.

When the petition of a corporation has been filed without the consent of the corporators legally obtained, an attaching creditor may file a petition asking to have the proceedings dismissed. *In re Lady Bryan Mining Co.*, 4 B. R. 144, 394; s. c. 2 Abb. C. C. 527; s. c. 1 Saw. 349.

If the petition is filed by virtue of a resolution of the directors alone, it will not be dismissed at the instance of a corporator who, with full knowledge of all the facts, delayed making his application for more than a year. *In re Baltimore County Dairy Association*, 11 B. R. 253; s. c. 2 Md. L. R. 297; *in re Jefferson Ins. Co.*, 11 B. R. 287.

The proof of his claim does not estop a creditor from setting up the invalidity of the proceedings on the ground that the petition was filed by the officers without the consent of the corporators, for consent can not give jurisdiction. *Ansonia Brass Co. v. Chimney Co.*, 10 B. R. 355; s. c. 13 B. R. 385; s. c. 64 Barb. 435; s. c. 53 N. Y. 123; s. c. 91 U. S. 656.

Whether the president was duly authorized to file the petition or not, is a question of fact to be determined by the district court. If there is a total defect of evidence to prove the essential fact and the court finds it without proof, the action of the court is void, but when the proof exhibited has a legal tendency to show a case of jurisdiction, then, although the proof may be slight and inconclusive, the action of the court will be valid until it is set aside by a direct proceeding for that purpose. *Ibid.*

Whether the officers who filed the petition were duly authorized to do so by a proper vote of the stockholders, is a question that can not be raised in a collateral action. *Davis v. Railroad Co.*, 13 B. R. 258; s. c. 1 Woods, 601.

Even though the petition is filed upon the authority of a vote of the directors and not of the corporators, yet the funds in the hands of the assignee can not be attached under a writ of attachment issued upon a judgment rendered in a State court against the corporation. The question whether the petition was filed by an officer of the corporation legally authorized by the act to do so, is one which belongs to the bankruptcy court; and whilst the proceedings in bankruptcy are in fieri, its judgment and the grounds upon which it was rendered are not matters of review in a State court. The assignee holds the property by virtue of his appointment by the bankruptcy court, and to that court alone is he responsible for its custody and disposition. *Newman v. Fisher*, 37 Md. 259.

In cases of involuntary bankruptcy, it is not necessary that there shall be a previous vote of the shareholders or corporators in order to authorize an attorney to appear for the corporation, and admit the alleged acts of bankruptcy and consent to an adjudication. *Lelter v. Payson*, 8 B. R. 317; s. c. 9 B. R. 205, s. c. 6 C. L. N. 157.

**Effects of Bankruptcy.**—The creditors have a right to all the property of the corporation which is all that they acquire by bankruptcy, and the provision in the law declaring that it shall not be discharged, is based upon

that proposition, and the ulterior remedy which they may have predicated upon the personal responsibility of the stockholders, officers, or members, and which would be destroyed if the debt itself were discharged. *Allen v. Soldiers Bus. Mes. & Dispatch Co.*, 4 B. R. 537; s. c. 2 L. T. B. 158.

A corporation for all essential purposes is as effectually dissolved by the commencement of proceedings in bankruptcy, as if a solemn judgment were pronounced to that effect. It is such a dissolution as will afford creditors a remedy against the individual shareholders where they are made liable upon dissolution of the corporation. *State Savings Association v. Kellogg*, 52 Mo. 583.

A bankrupt corporation is not liable for an injury caused by the negligence of an assignee or receiver. *Metz v. Buffalo, Corry & P. R. R. Co.*, 12 B. R. 559; s. c. 58 N. Y. 61.

The purchasers of a franchise of a bankrupt corporation do not, by the purchase, take the place of the pre-existing stockholders, and thereby become the incorporators acquiring the corporate entity. *Ibid.*

**Suits against Stockholders.**—Before recovery can be had in an action at law from the stockholders of an insolvent corporation in respect of the unpaid balances on their stock subscriptions, there must be either corporate action to fix, or a judicial ascertainment of the defendant's liability. *Payson v. Brooke*, 1 W. N. 89.

It is not competent for the assignee of a bankrupt corporation of his own motion to make an assessment on unpaid balances or installments on stock in such corporation. *Ibid.*

The assignee can not file a bill in equity against the stockholders for the purpose of having an account of the assets taken, and a call made for unpaid subscriptions. *Myers v. Seeley*, 10 B. R. 411; s. c. 1 Cent. L. J. 451.

The district court has the power to call in the unpaid stock for the purpose of paying the debts of the corporation. *In re Republic Ins. Co.*, 3 Biss. 452; *Sanger v. Upton*, 13 B. R. 226; s. c. 91 U. S. 56; *Webster v. Upton*, 91 U. S. 65.

If the certificate of stock provides that the balance unpaid thereon shall be paid on the call of the directors when ordered by a vote of the majority of the stockholders themselves, the bankruptcy court may make or direct any assessment or call necessary or preliminary to the collection of the assets, as fully to all intents and purposes as the stockholders or directors could have done if the company had not gone into bankruptcy. After the commencement of the proceedings in bankruptcy, neither the chartered officers nor stockholders had any right to interfere with the collection or distribution of the estate. All power over the estate and the assets of the company became thereby vested in the bankruptcy court, which then had the power and control over the assets that was previously vested in either the chartered officers of the company, or the stockholders, or both collectively. *Upton v. Hansbrough*, 10 B. R. 369; s. c. 3 Biss. 417; *Sanger v. Upton*, 13 B. R. 226; s. c. 91 U. S. 56.

Although the right to make an assessment does not arise under the charter, except in case of "losses exceeding the means of the corporation," yet the clause does not limit the right of the company or court to make an

assessment for the payment of losses only. When the funds are exhausted by losses, and an assessment becomes necessary, it may be made for all purposes, either to pay debts already contracted or to create a new fund for the purpose of a business basis. *In re Republic Ins. Co.*, 3 Biss. 452.

Every stockholder is bound to take notice of what the bankruptcy court does in winding up the affairs of the company, and it is in the discretion of the bankruptcy court whether to direct notice to be given to the stockholders or not before or during an assessment upon the stock. *Upton v. Burnham*, 8 B. R. 221; s. c. 3 Biss. 520; *Upton v. Hansbrough*, 10 B. R. 369; s. c. 3 Biss. 417.

If the order is made without notice, they may be considered as quasi parties to the bankruptcy proceedings to such an extent as to be bound by it in a collateral action. If they are dissatisfied with it, they have such a standing in the bankruptcy court as to enable them to move in that court to set aside the order if improvidently made, or to apply for a review in the circuit court. If they omit to do so, they are concluded in a collateral action. Neither can the question whether the call is for a larger amount than is necessary be inquired into collaterally. *Upton v. Hansbrough*, 10 B. R. 369; s. c. 3 Biss. 417; *Upton v. Burnham*, 8 B. R. 221; s. c. 3 Biss. 520; *Sanger v. Upton*, 13 B. R. 226; s. c. 91 U. S. 56; *Michener v. Payson*, 13 B. R. 49; s. c. 8 C. L. N. 17; s. c. 2 W. N. 339.

Not only the corporation, but its entire constituency, is before the court, and full justice can be done not only to creditors but among stockholders. If a part of the stockholders have paid more than their fair proportion, the others who have not paid can be compelled to pay enough to adjust the account among stockholders. The district court, having all the powers of a court of equity in the premises, can compel every stockholder to pay what in equity and good conscience he ought to pay, and distribute the proceeds of such payment among those entitled to receive it, whether creditors or stockholders who have paid more than their ratable share. *In re Republic Ins. Co.*, 3 Biss. 452.

An assessment may be made to pay the unearned premiums, to cancel policies yet unexpired. *Ibid.*

An assessment may be made to pay the expenses of closing the affairs of the company. This is incident to the administration of the law, and the item is one to be provided for out of the unpaid stock. *Ibid.*

An assignee of a bankrupt corporation may sue at law to recover the balance due on subscription for stock. *Sanger v. Upton*, 13 B. R. 226; s. c. 91 U. S. 56.

An exemplification of a decree authorizing an assessment of the stockholders by the assignee is not admissible if parts of the records of the proceedings that culminated in the decree are not certified and there is no offer to prove their contents. *Payson v. Brooke*, 1 W. N. 89.

An assessment by the bankruptcy court does not preclude a policyholder from making a defense to an action on the premium which shows that it is void. *Lamb v. Lamb*, 13 B. R. 17; s. c. 6 Biss. 420.

If a party pays part of a subscription for stock and accepts a certificate in blank, he is liable for the unpaid balance due thereon. *Sanger v. Upton*, 13 B. R. 226; s. c. 91 U. S. 56.

A premium note given to a foreign insurance company whose agent has not complied with the law in regard to filing his commission is void. *Lamb v. Lamb*, 13 B. R. 17; s. c. 6 Biss. 420.

Misrepresentation at the time when the subscription was taken, is no defense to an action by the assignee if the stockholder has been guilty of laches in discovering the fraud. *Farrar v. Walker*, 13 B. R. 82; s. c. 2 Cent. L. J. 670.

If a party has taken his certificate of stock and received a dividend thereon, he can not defeat an action for his subscription by proving a representation in regard to the establishment of a local office which was never carried out. *Michener v. Payson*, 13 B. R. 49; s. c. 8 C. L. N. 17; s. c. 2 W. N. 339.

A plea that a subscription was obtained by a fraudulent misrepresentation must show that the defendant made use of reasonable diligence to make himself acquainted with the matters of fact in respect of which the fraud is claimed, and when and how he repudiated the contract, and that he offered to surrender the certificate promptly upon discovering the fraud. *Upton v. Englehart*, 3 Dillon, 496.

A misrepresentation by an agent of the effect of the laws of another State, will not be a defense to an action by an assignee to recover the amount due on the subscription, if the subscriber has been guilty of any laches in discovering the fraud and repudiating the subscription. *Ibid.*

Where papers having color of compliance with the State statutes have been filed with the proper State officers, which meet their approval, but are in fact so defective as to be incapable of supporting the corporation as against the State, they are against a subscriber to its capital sufficient to constitute a corporation de facto if supported by proof of user. *Upton v. Hainsbrough*, 10 B. R. 369; s. c. 3 Biss. 417.

A resolution releasing the stockholders from liability for the balance due on their stock is fraudulent and inoperative when not made public. *Ibid.*

No fraud or misconduct by the managers of a corporation can be set up by stockholders to defeat their liability to creditors on unpaid stock. *In re Republic Ins. Co.*, 3 Biss. 452.

A representation made by an agent at the time of taking a subscription that no more than twenty per cent. would be called for, will not release the subscriber from his agreement. *Payson v. Withers*, 5 Biss. 269.

Stockholders are liable to be compelled to pay whatever remains unpaid upon their stock, whenever it becomes necessary that such payment should be made for the purpose of discharging the debts of the company, although the word "nonassessable," is written or printed across the face of the certificate. As between the company and its stockholders, this contract may be binding. *Upton v. Burnham*, 8 B. R. 221; s. c. 3 Biss. 520; *Webster v. Upton*, 91 U. S. 65.

To a certain extent, the terms of a grant are subject to the control of the legislature, and every stockholder takes his shares subject to that control, and subject also to the control of those who manage its affairs — namely, the board of directors. When the legislature merely declares that, instead of the stock being increased by the corporation at the discretion of the



stockholders, the stock shall be increased by the resolution or act of the board of directors, there is not such a change as will authorize a stockholder to say that his subscription is at an end. *Payson v. Withers*, 5 Biss. 269; *Payson v. Stoeper*, 2 Dillon, 427.

When a citizen of one State subscribes to the stock of a foreign corporation, he is presumed to know what the terms of the act are which created that corporation. They are created by the law of another State, and he, for the purpose of assuming his obligation, in a certain sense, goes into another State, and casts off, for the time, the vesture which his own State throws around him, and puts on that of the other State, and is bound by the obligations which the legislature of that State has imposed upon the corporation, the privileges which it has granted, and the conditions and terms of the grant. All these he is presumed to know, just as much as when he makes any contract to be executed by him in another State. *Payson v. Withers*, 5 Biss. 269.

The mere assignment of the certificate does not, of itself, constitute the assignee a stockholder, or create a liability upon the part of such transferee to pay assessments upon the stock. *Upton v. Burnham*, 3 Biss. 431.

The transferee of stock on the books of the corporation is liable for calls for the unpaid portion made during his ownership without proof of any express promise made by him to pay such calls. *Webster v. Upton*, 91 U. S. 65.

The vendor has a right to request that the stock shall be transferred on the books of the company, and when it is made at his request the purchaser becomes liable for subsequent calls. *Ibid*.

A certificate to a party, or registry of his name upon the stock register, is not absolutely necessary to constitute the legal relation or privity. The purchaser may waive it, and be held liable, without either a certificate or registry of his name. *Upton v. Burnham*, 3 Biss. 431.

An indebtedness on stock subscription is a debt that prevents a transfer of the stock. *In re Bachman*, 12 B. R. 223; s. c. 2 Cent. L. J. 119.

A transfer by the officers of a corporation while a debt remains unpaid, is void. *Ibid*.

Authority to an officer to make the transfer, is not sufficient where the by-law requires that the transfer shall be on the books of the corporation. *Ibid*.

The provision requiring the transfer to be upon the books of the company is for the benefit of the company, and the company can waive it; and if it is waived at the request of the holder of the certificate, or with his consent, express or implied, he is liable directly to the company for future assessments. *Upton v. Burnham*, 8 B. R. 221; s. c. 3 Biss. 431, 520.

If the certificate is indorsed in blank, and passed from the original subscriber to others, the entry of the name of the holder upon the stock-books is a waiver. The holder of a stock certificate, by assignment and blank transfer to him, becomes thereby clothed, not only with all the rights, but with all the obligations of a stockholder. *Ibid*.

If a dividend is paid to an officer at a time when a prudent officer should have known that there were no profits to be divided, the assignee may recover the amount. *Main v. Mills*, 6 Biss. 98.

§ 5123. Whenever a corporation created by the laws of any State, whose business is carried on wholly within the State creating the same, and also any insurance company so created, whether all its business shall be carried on in such State or not, has had proceedings duly commenced against such corporation or company before the courts of such State for the purpose of winding up the affairs of such corporation or company and dividing its assets ratably among its creditors and lawfully among those entitled thereto, prior to proceedings having been commenced against such corporation or company under the bankruptcy laws of the United States, any order made, or that shall be made, by such court agreeably to the State law for the ratable distribution or payment of any dividend of assets to the creditors of such corporation or company while such State court shall remain actually or constructively in possession or control of the assets of such corporation or company shall be deemed valid notwithstanding proceedings in bankruptcy may have been commenced and be pending against such corporation or company.

Statute revised — Feb. 3, 1873, ch. 135, 17 Stat. 436.

The State laws relating to insolvent corporations are superseded by the bankruptcy act. A State court has jurisdiction of an action taken by the State attorney-general to forfeit the charter of a corporation; but with the degree of forfeiture the jurisdiction ends. It can not go on and administer upon the property of the corporation, for the insolvent laws of the State touching insolvent corporations, by virtue of which the court can alone act, are no longer in force. The fact that the corporation has expired, and become extinct by the forfeiture of its charter, and that in consequence thereof no proceedings can be had against it, is no defense to an action to recover its property. The court will lay hold of such property wherever it can find it; and persons in possession of the same, whether claiming in open wrong or under a show of title, are parties proper to be made defendants in such a proceeding. Its property may be taken from a receiver appointed by a State court in an action to forfeit its charter. *Thornhill v. Bank*, 3 B. R. 435; s. c. 1 L. T. B. 156; s. c. 3 L. T. B. 38; s. c. 2 C. L. N. 157.

A State court which has a general equitable jurisdiction to settle the affairs of an insolvent corporation, does not lose it because proceedings in bankruptcy are instituted against the corporation. Until there is an adjudication of bankruptcy, the State court preserves its jurisdiction. *Watson v. Citizens' Savings Bank*, 9 B. R. 458; s. c. 5 Rich. (N. S.) 159.

An attorney of a corporation who advises it to apply for the benefit of the bankruptcy law, after the passing of an order by a State court restraining it from disposing of its funds, is guilty of a contempt to the State court. *Ibid.*

The jurisdiction of a State court over an insolvent corporation is at an end the moment the corporation is adjudged a bankrupt, and in this respect there is no difference between the proceedings of a State court under a particular statute relating to insolvent corporations and its proceedings under its general powers as a court of equity, to wind up the affairs of an insolvent corporation. *Watson v. Citizens' Savings Bank*, 11 B. R. 161.

The district court may take jurisdiction of the affairs of an insolvent corporation, even after the filing of a bill in a State court, to wind up its affairs, if no receiver has been appointed, although the officers may have been enjoined from disposing of its property. *Ibid.*

This action applies only to such orders relating to the ratable distribution or payment of dividends as the State courts may have passed prior to the commencement of proceedings in the district court, or prior to the adjudication in bankruptcy. *Ibid.*; in *re National Life Ins. Co.*, 6 Biss. 35.

A voluntary assignment is not a proceeding duly commenced against a corporation for the purpose of winding up its affairs, and does not prevent an adjudication of bankruptcy. In *re Harris, Rice & Co.*, 2 Cent. L. J. 224.

Until the assignee is appointed, the action of the receivers, who are officers of a State court, and the validity of arrangements made with them will not be affected by the commencement of proceedings in bankruptcy against a corporation. *Adams v. Railroad Co.*, 4 B. R. 314; s. c. 6 A. L. Rev. 365; s. c. 1 Holmes, 30.

The costs and commissions of the receiver should be paid before the balance is paid to the assignee. *Loudon v. Blanford*, 56 Ga. 150.

If the assignee applies for the funds in the hands of a receiver, the State court may first direct that the fees for the defendants' counsel shall be paid. *Clark v. Binniger*, 1 Abb. N. C. 421.

A receiver of an insolvent corporation is not entitled to an allowance for the expense incurred by him in employing counsel to resist a suit brought by the assignee to recover the property. *Platt v. Archer*, 13 Blatch. 351.

A receiver can not be allowed for the expense of the services of an attorney in accounting before a State court after the commencement of the suit by the assignee to recover the property. *Ibid.*

A receiver may be allowed the expense for the services of counsel which benefited the estate and were not hostile to the commencement of the proceedings in bankruptcy. *Ibid.*

A receiver of an insolvent corporation is not entitled to an allowance for the expense incurred by him in resisting the proceedings in bankruptcy. *Ibid.*

## **TITLE XII.**

### **FEES, COSTS AND ATTORNEY-GENERAL'S STATISTICS.**

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**ACT OF 1898, CH. 5, § 40. Compensation of Referees.**—(a) Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

(b) Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

(c) In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

**§ 48. Compensation of Trustees.**—(a) Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars.

(b) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

(c) The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

§ 51. **Duties of Clerks.**—(a) Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

§ 52. **Compensation of Clerks and Marshals.**—(a) Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

(b) Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

§ 62. **Expenses of Administering Estates.**—(a) The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved they shall be paid or allowed out of the estates in which they were incurred.

In 1868 a suit was commenced by one T. against C. and others for the joint benefit of the bankrupt and one W., who had agreed to share in the results of the litigation and bear its expenses in equal proportions. A judgment was recovered in favor of T., from which an appeal was taken about the time the proceedings in bankruptcy were commenced.

The assignee in bankruptcy was substituted in place of the bankrupt, who was a defendant in the suit, and contributed to the payment of counsel fees and expenses until he gave notice that he would pay no more expenses. Afterward, under an order of the court, the assignee was permitted to withdraw and assign all his interest in the litigation to W. The judgment was reversed by the general term and a new trial ordered, and the court of appeals affirmed the judgment of the general term. The counsel having, after the termination of the suit, presented a claim against the assignee for their services before as well as after his substitution; Held, that they were only entitled to payment for their services and disbursements after the assignee stipulated to be substituted, and that W., by taking the assignment of the assignee's interest, assumed all its burdens, and has no equity to demand reimbursement from the assignee. *In re Litchfield*, 18 B. R. 347.

While the assignee is bound to pay a reasonable compensation for the use of premises occupied by him in winding up the estate, he does not, by accepting the trust, become the assignee of leases belonging to the bankrupt, or bound to pay the rent reserved. *In re Ives et al.*, 18 B. R. 28.

The same rule applies where the marshal kept property seized by him on premises which had been leased by the bankrupt. The estate is liable to the landlord before the appointment of the assignee, not on the ground of contract, but upon equitable considerations for a benefit conferred upon the estate, and the allowance is to be measured by the benefit thus conferred. Ordinarily it is the value of the premises for storage of the goods, unless circumstances are such as to make a greater expense proper. The landlord is entitled to nothing by virtue of the covenants of the lease unless the assignee elected to take the lease, and thereby became in fact the assignee thereof. *In re Wheeler & Lang*, 18 B. R. 385.

An assignee is not bound to take a leasehold estate belonging to the bankrupt unless it would be beneficial to the creditors for him to do so. *White v. Griffing*, 18 B. R. 399.

Where the assignee has accepted the lease, and has sold his interest, as assignee in the leased premises to the lessor, the lease is thereby extinguished, and the guarantor of the lease released from all liability accruing after the commencement of the bankruptcy proceedings. *Ibid.*

ACTS OF 1867 and 1875, § 5124. In each case there shall be allowed and paid, in addition (a) to the fees of the clerk of the court as now established by law, or as may be established by general order for fees in bankruptcy, the following fees, which shall be applied to paying for the services of the registers:

First. For issuing every warrant, (b) two dollars.

Second. For each day in which a meeting (c) is held, three dollars.

Third. For each order for a dividend, three dollars.

Fourth. For every order substituting an arrangement by trust deed for bankruptcy, two dollars.

Fifth. For every bond with sureties, two dollars.

Sixth. For every application for any meeting in any matter under this Title,<sup>1</sup> one dollar.

Seventh. For every day's service while actually employed under a special order (d) of the court, a sum not exceeding five dollars, to be allowed by the court.

Eighth. For taking depositions, the fees now allowed by law.

Ninth. For every discharge when there is no opposition, two dollars.

Such fees shall have priority of payment over all other claims out of the estate; and, before a warrant issues, the petitioner shall deposit with the clerk of the court fifty dollars, (e) as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued shall pay the same, and the court may issue an execution against him to compel the payment to the register.

Statutes revised — March 2, 1867, ch. 176, § 47, 14 Stat. 540; July 27, 1868, ch. 258, § 2 15 Stat. 228. Prior Statutes — April 4, 1800, ch. 19, §§ 46, 47, 2 Stat. 33; Aug. 19, 1841, ch. 9, § 13, 5 Stat. 448.

(a) The fees for necessary services performed by the clerk in bankruptcy proceedings, which are not provided for by the bankruptcy act or the rules, but are provided for by section 828, may rightfully be taxed and allowed under the latter. In re A. Alexander, 3 B. R. (quarto) 20.

The register is not entitled to fees of clerk in addition to the fees given by the act to the register. In re John W. Dean, 1 B. R. 249; s. c. 1 L. T. B. 9; in re A. Alexander, 3 B. R. (quarto) 20.

The order of reference is not a process, and the clerk is not entitled to a fee of \$1 for issuing it. In re John W. Dean, 1 B. R. 249; s. c. 1 L. T. B. 9.

Form No. 45 is a process. Ibid.

(b) The register is not entitled to any fee for the list of creditors that accompanies the warrant. In re J. H. Robinson, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.

(c) Where two meetings are held in the same case on one day, the register is only entitled to \$3. Ibid.

The word "meeting," wherever used in this section and elsewhere, means a meeting of creditors, such as is spoken of in sections 5033, 5092, 5093. In re Macintire, 1 B. R. 11; s. c. 1 Ben. 277. Contra, in re Sherwood, 1 B. R. 344; s. c. 6 Phila. 461.

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<sup>1</sup> So amended by act of February 18, 1875, ch. 80, 18 Stat. 320.

Whenever the register orders the creditors to meet, he is entitled to this fee. In re John W. Dean, 1 B. R. 249; s. c. 1 L. T. B. 9. Contra, in re J. H. Robinson, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.

The register is not entitled to this fee for making an order for the bankrupt to appear for examination. In re Macintire, 1 B. R. 11; s. c. 1 Ben. 277.

Nor making the order to show cause against the bankrupt's discharge. In re J. H. Robinson, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.

(d) The register is entitled to \$5 a day while acting under an order to examine the papers and report upon their regularity. In re John W. Dean, 1 B. R. 249; s. c. 1 L. T. B. 9; in re J. H. Robinson, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.

The register is entitled to \$5 a day while acting under a special order of court to take charge of the bankrupt's property, and superintend sales thereof. In re Loder Brothers, 3 B. R. 517; s. c. 3 Ben. 211; s. c. 1 L. T. B. 159.

The order of reference is not a special order, and the register is not entitled to \$5 a day while acting under it. In re John W. Dean, 1 B. R. 249; s. c. 1 L. T. B. 9; in re J. H. Robinson, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25; in re Sherwood, 1 B. R. 344; s. c. 6 Phila. 461.

Where the bankrupt appears in pursuance of an order for his examination, and the examination is postponed without doing anything, the register is not entitled to \$5 as for a day's service. In re I. Clark, 1 B. R. 188; s. c. 2 Ben. 72.

(e) The whole \$50 must be immediately handed over to the register to whom the case is referred. Anon., 1 B. R. 24.

When a petition is dismissed for want of jurisdiction, the money deposited as security for the fees of the clerk and register must be returned to the petitioner. In re Magle, 1 B. R. 522; s. c. 2 Ben. 369.

The balance that remains after deducting the fees of the register is to be paid to the assignee. In re Sherwood, 1 B. R. 344; s. c. 6 Phila. 461; in re Appold, 1 B. R. 621; s. c. 6 Phila. 469; s. c. 1 L. T. B. 83; Anon., 1 B. R. 123; in re James, 2 B. R. 227; s. c. 1 L. T. B. 121.

If the assets are insufficient in an involuntary case, the court may order the bankrupt to pay the fees of the clerk and the register. In re McBride, 1 W. N. 42.

When the register applies for an order for the payment of his fees in excess of the deposit where there are no assets, it will be set down for hearing upon notice to the petitioning creditors and the bankrupt. In re McBride, 1 W. N. 16.

The following list shows the decisions that have been made in regard to fees in the most important cases. The following abbreviations have been used, to-wit: a, allowed; d, disallowed; r, reduced; B, not charged against the estate, but to be paid by the bankrupt: In re J. H. Robinson, 1 B. R. 285; s. c. 2 Ben. 145; s. c. 1 L. T. B. 25.



## REGISTER'S FEES.

Examining schedules and certifying same correct.....	\$5 00 d
Certified copy of adjudication of bankruptcy.....	0 45 r to 0 35
Application for first meeting of creditors.....	1 00 d
Certified list of creditors for warrant.....	0 95 d
Supplemental warrant .....	2 00 a
Certified copies of schedules for assignees .....	4 45 a
One day's service under special order of reference upon petition for final discharge .....	5 00 a
Application for meeting at the same time.....	1 00 d
Order to show cause and certifying copy for clerk.....	1 00 d
Application for second and third meetings.....	2 00 r to 1 00
Deposition of assignee on his return .....	0 65 a
Service under special order to show cause why the bank- rupt should not be discharged .....	5 00 a
Second and third meetings of creditors .....	6 00 r to 3 00
Services, examination of bankrupt and proceedings, and for making a certificate of conformity .....	5 00 a
Discharge without opposition .....	2 00 a
In re John W. Dean, 1 B. R. 249; s. c. 1 L. T. B. 9.	

## REGISTER'S FEES.

Examining schedules and certifying same correct.....	\$5 00 d
Certified copy of adjudication of bankruptcy.....	0 45 r to 0 35 B
Certified copy of memorandum .....	0 45 r to 0 35
Certified list of creditors who have proved their debts, for clerk .....	0 35 a
Certified list of creditors who have proved their debts, for assignee, not to be furnished except for dividend.....	0 35 d
Order, Form No. 15 .....	not stated. d
Order appointing assignees and notice .....	not stated. d
Assignment of bankrupt's effects .....	not stated. d
Certified copy of schedules for assignee .....	not stated. a
Taking bond of assignee .....	2 00 a
Applications for second and third meetings .....	2 00 r to 1 00
Final meeting under order to show cause .....	3 00 d
Second and third meetings .....	6 00 r to 3 00
Final examination, 10 folios at 20c., certificate at 25c., charge for certificate .....	r to 0 15
Examination of papers and certificate of conformity .....	5 00 a
Discharge .....	2 00 a
Stationery, postage, rent, incidental expenses, clerk hire, &c. . . . .	not stated. d

## CLERK'S FEES.

Filing and entering petition and schedules, and oaths A and B, at 10c. ....	\$0 30 a
Issuing order, Form No. 4 .....	1 00 d

Drawing assignment and affixing seal of court .....	\$0 65 a
Issuing order, Form No. 45 .....	1 00 a
Certificate of discharge and seal .....	not stated. a B.
Entering on six papers, certificate of day and hour of filing, at 15c a folio .....	not stated. a B.
Clerk's certificate and seal to judge's signature .....	not stated. a B.
To certificate of discharge .....	not stated. a B.

## ASSIGNEE'S FEES.

Services rendered. Actual disbursements and .....	\$19 00 a
In re A. Alexander, 3 B. R. (quarto) 20.	

## CLERK'S FEES.

Filing certificate, and entry of order to record assignment.	\$0 40 a
Filing, certifying, and entry of assignment .....	1 05 a
Certified copy of assignment .....	1 00 d
Issuing warrant .....	1 50 a

## REGISTER'S FEES.

Filing three papers, viz.: petition, assignment, and order of reference .....	\$0 75 r to 0 45
Certifying correctness of petition and schedules .....	0 55 a
Issuing orders of adjudication .....	1 00 }
Certifying same to clerk .....	1 00 } r to 1 00
Entering case and proceedings in docket .....	1 00 d
Certifying abstract of same to clerk .....	0 25 a
Certifying copy of petition and schedules .....	6 50 a
One hour's employment order special order .....	0 40 a
One day's service at meeting of creditors .....	5 00 r to 3 00
Oath upon return of warrant .....	0 50 a
Issuing order appointing assignee .....	1 00 }
Certifying same to clerk .....	1 00 } r to 1 00
Application for meeting of creditors .....	1 00 }
Issuing order calling the same .....	1 00 }
Certifying same to clerk .....	1 00 }
Affidavit to order calling meeting .....	0 50 a
Affidavit to assignee's report .....	0 50 a
In re Sherwood, 1 B. R. 344; s. c. 6 Phila. 461.	

This case was attended to in a county remote from the residence of the register. The services performed were not rendered under any special order of the court, except, perhaps, those rendered on the first day's attendance of the bankrupt. For this day \$3 were allowed. Also \$3 for every day employed, subject to the conditions imposed by Rule VI. The traveling expenses were apportioned among the several cases attended to at the same time, and allowed. Three dollars for each day consumed in going and returning might be allowed, but should be

apportioned like the traveling expenses. Five dollars for each day employed at the following three stages, to-wit: the time preceding the issuing of the warrant, the first meeting, and the final discharge, might be a reasonable allowance. As the cause was *ex parte*, the last two points were not definitely settled.

§ 5125. The traveling and incidental expenses of the register, and of any clerk or other officer attending him, shall be settled by the court in accordance with the rules prescribed by the justices of the supreme court, and paid out of the assets of the estate in respect of which such register has acted; or if there are no such assets, or if the assets are insufficient, such expenses shall form a part of the costs in the case in which the register acts, to be apportioned by the judge.

Statute revised — March 2, 1867, ch. 176, § 5, 14 Stat. 519.

Where the services in the case are all rendered in the office of the register, he is not entitled to an allowance for traveling and incidental expenses. In *re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9.

The expenses of the register should be apportioned among all the cases attended to at the same time. In *re Sherwood*, 1 B. R. 344; s. c. 6 Phila. 461.

ACT OF 1898, CH. 5, § 52. Compensation of Marshals.—(*Ante*, p. 767.)

ACT OF 1867, § 5126. Before any dividend is ordered, the assignee shall pay out of the estate to the messenger the following fees, and no more:

First. For service of warrant, two dollars.

Second. For all necessary travel, at the rate of five cents a mile each way.

Third. For each written note to creditor named in the schedule, ten cents.

Fourth. For custody of property, publication of notices, and other services, his actual and necessary expenses, upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of such expenses.

For cause shown and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

Statute revised — March 2, 1867, ch. 176, § 47, 14 Stat. 540.

The marshal has the right to charge mileage for serving the order to show cause, the injunction, and the adjudication. The travel so charged

for must be necessary travel. The language of the act precludes all constructive mileage whatsoever. Hence it is essential that the marshal should state the place of service in his return, in order that the correctness of the mileage charged may appear upon its face. If he has two or three processes in his hand at the same time, and in the same matter or proceeding, which may be served at the same time and place, he can charge mileage but once. If the service of any one of such processes makes additional travel necessary, he may charge for such additional travel, but no more. In *re Donahue et al.*, 8 B. R. 453. Contra, in *re Talbot*, 2 B. R. 280; s. c. 2 L. T. B. 15.

It is probable that in framing Rule XII the judges understood that the first clause of this section, providing a fee of \$2 for service of warrant, without adding, "and travel," would preclude any charge for travel in serving that particular process, but that the payment of the marshal's actual and necessary expenses in making such service was intended to be provided for by the fourth clause, under the phrase "and other services." In *re Donahue et al.*, 8 B. R. 453.

The warrant is the warrant provided for by sections 5019 and 5028 to be issued after adjudication, and may perhaps include the provisional warrant provided for by section 5024. *Ibid.*

The distance by the nearest traveled route from the place of service to the place of return is the "necessary travel" meant by the act. The marshal may charge for mileage although the process is sent by mail to a deputy at the place of service, and returned in the same manner. The manner of getting the process there and back is a matter purely of the marshal's own concern, and something with which the court has nothing to do so long as there is no complaint of any consequent failure of official duty. *Ibid.*

When the notices are served by mail, the marshal can not charge for constructive mileage. In *re A. Alexander*, 3 B. R. (quarto) 20.

The marshal is not entitled to ten cents per folio for copying the notices to creditors. The notices are not copies. Each notice is an original paper. In *re John W. Dean*, 1 B. R. 249; s. c. 1 L. T. B. 9; in *re Talbot*, 2 B. R. 280; s. c. 2 L. T. B. 15.

The amount paid to the printer for printing these notices may be allowed as expenses for other services provided for by Rule XII. In *re Talbot*, 2 B. R. 280; s. c. 2 L. T. B. 15.

The word "expenses" implies an expenditure or payment, and nothing can be allowed as expenses under this section which is not shown affirmatively to have been necessary and just and reasonable in amount, and to have been actually paid. The sum actually paid a keeper to watch property in custody, not exceeding \$2.50 a day, may be taxed, upon proof that a prudent precaution in regard to all concerned in the property justified the marshal in placing a keeper over it, that the keeper actually continued in charge of it for the time specified, and that the sum charged therefor is reasonable for the service, and has been actually paid by the marshal. In *re Lowenstein et al.*, 3 B. R. 269; s. c. 3 Ben. 422; in *re Anon.*, 4 C. L. N. 210; in *re Eugene Comstock*, 9 B. R. 88.

The marshal may appoint a watchman, although the goods could be safely stored. *In re Hare*, 43 How. Pr. 86.

Something beyond the ordinary duties which a marshal is called upon to discharge in all cases, is contemplated by the provision for a further allowance. *Ibid*.

There is no rule of law or practice authorizing the marshal to charge a commission upon his own cost bill. *In re Anon.*, 4 C. L. N. 210.

Neither this section nor Rule XII specifies all the services which the marshal as messenger may be called upon to perform, and, therefore, no tariff or fees, covering all the acts which he may be called upon to perform, has been prescribed either by Congress or the supreme court, but the taxation of such fees is left to the discretion of the court. It was not the intention of Congress to limit his fees for all services which he might probably render to the four items enumerated in this section. The rules to be observed in taxing the costs of the marshal are: 1st. To allow him such fees as are specifically enumerated by law; and, 2d. Such other fees, not included in the enumerated fees, as he may show himself to have earned, the items to be determined by analogy to those allowed for similar services rendered by him in the district court in cases at common law and in chancery. If he sends process by mail to his deputy in a distant county for service, he is entitled to mileage on that process; and if he sends a deputy to such county, he is entitled to be paid the reasonable expenses of such deputy, but, in that event, he is not entitled to mileage. *Ibid*.

Mileage may be allowed without an affidavit that the same was necessary and actually performed. All that is necessary is, that the place of service be stated in the return, so that the correctness of the distance charged for may be ascertained if disputed. The marshal's travel fees are not included among the items as to which he is required to make oath. Those requirements relate exclusively to disbursements of money by the marshal in the manner and for the purposes named. In all other respects his official return is *prima facie* sufficient. *In re Donahue et al.*, 8 B. R. 453.

Interest can not be allowed on the marshal's fees for services before they have been duly taxed and allowed. His expenditures, however, stand upon a different footing. They are often necessarily large, and far beyond the amount required to be deposited, and it is a matter of but simple justice that he should be compensated by way of an allowance at the usual rate of interest or otherwise for such advances. *Ibid*.

The following list shows the decisions that have been made in the most important cases. These abbreviations have been used, to-wit: a, allowed; d, disallowed.

Service of warrant .....	\$2 00 a	
Necessary travel, 592 miles, at 5c. ....	29 60 d	} necessary ex- penses alone.
Notices to creditors, 27, at 10c. ....	2 70 a	
Actual and necessary expenses in publication of no- tices—advertising, \$4, preparing same, 90c., post- age, envelopes . ....	4 98 a	

Preparing 27 notices, 118 folios, at 10c. ....	\$11 80 d
Stamps and envelopes, 27 notices, at 4c. ....	1 08 a
Furnishing two copies of advertisements, at 5c....	0 10 a
Making affidavit to warrant .....	0 50 a
Draft and copy costs, 1 folio .....	0 10 a
Attendance . . . . .	1 50 d

In re Talbot, 2 B. R. 280; s. c. 2 L. T. B. 15.

Serving five defendants and parties in Mercer Co. with order . . . . .	\$10 00 a
Three copies of petition on defendants, \$6.00; copies \$2.25 . . . . .	8 25 a
Warrant of seizure, \$2.00; one copy, \$1.50.....	3 50 a
Expenses of deputy sent to Mercer Co., \$29.30; tele- grams . . . . .	31 90 a
Wages of deputy in possession 9 days after seizure, at \$2.00 . . . . .	18 00 a
Serving order of adjudication on two parties, \$4.00; copy, 50c.; mileage, \$17.00.....	21 50 a
Preparing notice publication, 40c.; paid printers, \$9.60 . . . . .	10 00 a
Preparing notice 1st meeting, \$7.60; services, \$3.00; postage, \$1.00 . . . . .	11 60 a
Serving orders on two keepers to deliver, \$4.00; copy, 50c. . . . .	4 50 a
Copies of inventories .....	5 76 a
Ninety days keepers' fees, at \$2.00 .....	180 00 a

In re Anon., 4 C. L. N. 210.

Service of warrant .....	\$2 00 a
Each written notice to creditors in schedules, at 10c..	6 90 a
Necessary expenses in publication of notices .....	4 00 a
Postage . . . . .	1 97 a
Copying notices, 483 folios, 10c. per folio.....	48 30 d

In re A. Alexander, 3 B. R. (quarto) 20.

§ 5127. The enumeration of the foregoing fees shall not prevent the justices of the Supreme Court from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in the three preceding sections, in classes of cases to be named in their general orders.

Statute revised -- March 2, 1867, ch. 176, § 47, 14 Stat. 540.

The authority conferred upon the justices is to prescribe a tariff of fees for all "other services," that is, for services other than those for which provision is made in this section. It is also limited to reduction only, and does not extend to the entire abolition of the fees for which provision is so made. In re Donahue et al., 8 B. R. 453.

§ 5127A (June 22, 1874, ch. 390, § 18, 18 Stat. 184). That from and after the passage of this act, the fees, commissions, charges, and allowances, excepting actual and necessary disbursements, of, and to be made by the officers, agents, marshals, messengers, assignees, and registers in cases of bankruptcy, shall be reduced to one-half of the fees, commissions, charges, and allowances heretofore provided for or made in like cases: *Provided*, That the preceding provision shall be and remain in force until the justices of the Supreme Court of the United States shall make and promulgate new rules and regulations in respect to the matters aforesaid, under the powers conferred upon them by sections four thousand nine hundred and ninety [ten] and five thousand one hundred and twenty-seven [forty-seven] of said act, and no longer, which duties they shall perform as soon as may be.

Reduction applies to the fees of the clerk. In re Hunt, 1 Cent. L. J. 359.

ACT OF 1898, CH. 5, § 53. **Duties of Attorney-General.**—(a) The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

§ 54. **Statistics of Bankruptcy Proceedings.**—(a) Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

ACT OF 1867, § 5127B (June 22, 1874, ch. 390, § 19, 18 Stat. 184). That it shall be the duty of the marshal of each district, in the month of July of each year, to report to the clerk of the district court of such district, in a tabular form, to be prescribed by the justices of the Supreme Court of the United States, as well as such other or further information as may be required by said justices,

First, the number of cases in bankruptcy in which the warrant prescribed in section five thousand and nineteen [eleven] of said act has come to his hands during the year ending June thirtieth, preceding;

Secondly, how many such warrants were returned, with the fees, costs, expenses, and emoluments thereof, respectively and separately;

Thirdly, the total amount of all other fees, costs, expenses, and emoluments, respectively and separately, earned or received by him during such year, from or in respect of any matter in bankruptcy;

Fourthly, a summarized statement of such fees, costs, and emoluments, exclusive of actual disbursements in bankruptcy, received or earned for such year;

Fifthly, a summarized statement of all actual disbursements in such cases for such year.

And in like manner, every register shall, in the same month and for the same year, make a report to such clerk of,

First, the number of voluntary cases in bankruptcy coming before him during said year;

Secondly, the amount of assets and liabilities, as nearly as may be, of the bankrupt;

Thirdly, the amount and rate per centum of all dividends declared;

Fourthly, the disposition of all such cases;

Fifthly, the number of compulsory cases in bankruptcy coming before him, in the same way;

Sixthly, the amount of assets and liabilities, as nearly as may be, of such bankrupts;

Seventhly, the disposition of all such cases;

Eighthly, the amounts and rate per centum of all dividends declared in such cases;

Ninthly, the total amount of fees, charges, costs, and emoluments of every sort, received or earned by such register during said year in each class of cases above stated.

And in like manner, every assignee shall, during said month make like return to such clerk, of,

First, the number of voluntary and compulsory cases, respectively and separately, in his charge during said year;

Secondly, the amount of assets and liabilities therein, respectively and separately;

Thirdly, the total receipts and disbursements therein, respectively and separately;

Fourthly, the amount of dividends paid or declared, and the rate per centum thereof, in each class respectively and separately;

Fifthly, the total amount of all his fees, charges, and emoluments, of every kind therein, earned or received;

Sixthly, the total amount of expenses incurred by him for legal proceedings and counsel fees.



Seventhly, the disposition of the cases respectively;

Eighthly, a summarized statement of both classes as aforesaid.

And in like manner, the clerk of said court, in the month of August in each year, shall make up a statement for such year, ending June thirtieth, of,

First, all cases in bankruptcy pending at the beginning of the said year;

Secondly, all of such cases disposed of;

Thirdly, all dividends declared therein;

Fourthly, the number of reports made from each assignee therein;

Fifthly, the disposition of all such cases;

Sixthly, the number of assignees' accounts filed and settled;

Seventhly, whether any marshal, register, or assignee has failed to make and file with such clerk the reports by this act required, and if any have failed to make such reports, their respective names and residences.

And such clerk shall report in respect of all cases begun during said year.

And he shall make a classified statement, in tabular form, of all his fees, charges, costs, and emoluments, respectively, earned or accrued during said year, giving each head under which the same accrued, and also the sum of all moneys paid into and disbursed out of court in bankruptcy, and the balance in hand or on deposit.

And all the statements and reports herein required shall be under oath, and signed by the persons respectively making the same.

And said clerk shall in said month of August, transmit every such statement and report so filed with him, together with his own statement and report aforesaid, to the attorney-general of the United States.

Any person who shall violate the provisions of this section shall on motion made, under the direction of the attorney-general, be by the district court dismissed from his office, and shall be deemed guilty of a misdemeanor, and, on conviction thereof, be punished by a fine of not more than five hundred dollars, or by imprisonment not exceeding one year.

## TITLE XIII

### PROHIBITED AND FRAUDULENT TRANSFERS.

ACT OF 1898, CH. 6, § 60. **Preferred Creditors.**—(a) A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

(b) If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

(c) If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

(d) If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

ACT OF 1898, CH. 1, SEC. 1. \* \* \* **Definition.**—(25) "Transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security.

Act of 1867, § 5128. If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and<sup>1</sup> knowing that such attachment<sup>1</sup> sequestration, seizure, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this Title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited.<sup>1</sup> And nothing in said section five thousand one hundred and twenty-eight [thirty-five] shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of the making of such loan.

Statute revised — March 2, 1867, ch. 176, § 35, 14 Stat. 536. Prior Statutes — April 4, 1800, ch. 19, § 28; 2 Stat. 28; Aug. 19, 1841, ch. 9, § 2, 5 Stat. 442.

Where one bank has knowledge of insolvency of another, repayment to former by latter of deposits on the day of its failure is a preference, and may be recovered by the assignee. *Phelan, Assignee, v. Iron Mountain Bk.*, 16 B. R. 308.

An insolvent debtor who was a trader gave a creditor new notes, payable on demand, signed by himself alone, to take up others of the same amount, secured by the signature and indorsement of other responsible parties, and purchased goods of persons who were ignorant of his insolvency, in order that such goods might be taken on execution or judgments recovered on such notes: Held, that he thereby procured, at least suffered, his property to be seized on execution within the meaning of the act. *Sage, Jr., v. Wynkoop, Assignee*, 16 B. R. 363.

An oral promise, made at time debt is contracted, to give security if required, can not be executed after the debtor has become insolvent. *Lloyd, Assignee, v. Strobridge*, 16 B. R. 197.

Where creditor accepts and records a chattel mortgage, correctly describing note secured, in place of a prior unrecorded mortgage incorrectly describing such note, the transaction does not constitute an illegal preference, but is a simple exchange of securities. *Player, Assignee, v. Lippincott*, 16 B. R. 208.

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<sup>1</sup> So amended by act of June 22, 1874, ch. 390, § 11, 18 Stat. 180.

Where a private banker obtains an advance from a bank on his check from New York, and on the following day delivers securities to the bank stating at the time that he had reason to fear his check would not be met: Held, that the securities were transferred with intent to give a preference, and that the bank had reasonable cause to believe him insolvent. *Merchants Nat. Bk. v. Cook*, 16 B. R. 392.

The taking of a bill of sale of logs purchased with money furnished by the creditor is not a preference unless it appears that such bill of sale included more than the creditor was entitled to. *In re The Bousfield & Poole Mfg. Co.*, 16 B. R. 489.

Where M., in pursuance of a scheme to obtain a preference for H., a creditor of the bankrupt, purchased logs of the bankrupt and subsequently took a transfer of a note held by H.: Held, that he held such note as trustee for H., and that the acceptance of the logs was a preference. *In re Stein*, 16 B. R. 569.

The debtor can not be admitted as a witness to testify as to his intent in making the transfer. Where probable consequence of the act is to give a preference he will be conclusively presumed to have intended to give such preference. *Ecker v. McAllister*, 17 B. R. 42.

Mere nonresistance of a debtor to judicial proceedings against him, when the debt is due and there is no valid defense to it, is not suffering and giving a preference under the bankruptcy act. *Tenth Nat. Bk. v. Warren*, 17 B. R. 75.

Giving a note indorsed by a third party, on account of an indebtedness, is not a fraudulent preference. *Dalrymple v. Hillenbrand*, 17 B. R. 434.

Bankrupts were members of a firm doing business in the State of New York, and also members of other firms engaged in same business in Canada, but in each of said firms there was another partner—at least nominally. The creditors of the Canadian firms having threatened suits to sequester property of those firms in Canada, transfers of same, upon recommendation of some of the principal New York creditors, were made by way of mortgage to such creditors, in consideration of advance to carry on the business and secure payment of the debts of the Canadian firms. It appears that the transfers were made in good faith. Held, that under the circumstances the transfers were not preferences within meaning of the act. *In re White et al.*, 18 B. R. 106.

Defendant bank was a creditor of bankrupt by note of \$4,000, and at same time indebted to bankrupt on deposit account to amount of \$4,500. Prior to bankruptcy proceedings, and at maturity of note, defendant, with knowledge of bankrupt's insolvency, received from him a check for \$4,000, and surrendered the note, and by the transaction reduced to that extent the amount of deposit account in favor of bankrupt on books of defendant. Held, an adjustment of mutual debts, within meaning of the act, and not a fraudulent preference. *Robinson v. Wisconsin M. & F. Ins. Co. Bk.*, 18 B. R. 243.

Payments to the government, though with intent to give a preference, not forbidden by the act. *Tiffany v. Morrison*, 18 B. R. 365.

A deputy U. S. revenue collector, becoming insolvent, paid over to his principal, within four months of his adjudication as a bankrupt, moneys received by him in line of his duty as such officer: Held, not an unlawful preference. *Ibid.*

As between the parties to a chattel mortgage, the circumstance that the mortgagees allowed the mortgagor to remain in possession of the mortgaged property, after condition broken, will not affect the validity of the mortgage. Where such a secured creditor takes goods in fair exchange for the security, the transaction is not a preference forbidden by the bankruptcy law. *Halleck & Bro. v. Tritch, Assignee*, 17 B. R. 293.

Where the bankrupt at the time of giving a mortgage, in pursuance of a previous agreement to secure pre-existing debt, requests the creditor to permit him to secure other creditors in such instrument, such request is notice of the existence of such creditors and of the bankrupt's inability to pay them. *Lloyd, Assignee, v. Strobbridge*, 16 B. R. 197.

A creditor who has obtained a preference is chargeable with knowledge of facts, the existence of which he could have ascertained by the slightest effort. *Ibid.*

Not necessary for the creditor to know that preferences are prohibited. It is enough if he knew such facts and circumstances as bring it within the prohibition of the law. *Ibid.*

Where the mortgage sought to be set aside was executed within the time specified in bankruptcy act, with a view to give a preference, the fact of repeated promises to pay, which were not kept, together with knowledge on the part of the creditor of a large amount of debts due by the bankrupt at or prior to that time, which he was unable to pay: Held, to be a reasonable cause for the creditor to believe that the insolvency which in fact existed did exist. *In re Armstrong*, 16 B. R. 275.

Where such creditor knew of other unsecured debts which the debtor could not pay, and that a large part of the property was common to all from which to get their pay: Held, that he knew the mortgage was made in fraud of the provisions of the bankruptcy law. *Ibid.*

A creditor may be said to have reasonable cause to believe a debtor was insolvent, where the fact of insolvency actually existed, when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor as would lead a prudent man to the conclusion that the debtor is unable to meet his obligations as they mature in ordinary course of his business. (This was under definition of insolvency in law of 1867.) *Dutcher v. Wright*, 16 B. R. 331; *Merchants Nat. Bk. v. Cook*, 16 B. R. 392.

In calculating the time a preference must stand in order to be valid, the day the petition was filed must be excluded. *Dutcher v. Wright*, 16 B. R. 331.

Knowledge, or reasonable cause to know, on part of creditor's agent that the transaction was in fraud of the bankruptcy law is same as if the creditor himself had participated therein with same cause to believe and same knowledge. *Sage, Jr., v. Wynkoop, Assignee*, 16 B. R. 363.

In order to invalidate a security taken by a creditor from an insolvent debtor it is not sufficient that the creditor had some cause to suspect the insolvency of the debtor, but he must have such a knowledge of facts as to induce a reasonable belief thereof. *Grant, Assignee, v. First Nat. Bk.*, 17 B. R. 498.

Where a surety for a debtor in failing circumstances takes a transfer of the debtor's property, and from the proceeds of the sale thereof pays the debt, the assignee in bankruptcy of the debtor can not recover the amount so paid from the creditors receiving it, where they were without any information as to the source from which it was derived, and the payment was made and accepted as in discharge of the surety's obligation. *Tyler, Assignee, v. Brock*, 17 B. R. 239.

Schedules of indebtedness made by a bankrupt are not competent evidence to show his insolvency in an action brought by the assignee (trustee) under this provision. *Ibid.*

Bankrupt was a druggist, manufacturer and a stock speculator, and had committed forgery. The agent and director of the bank, having heard of the forgeries, demanded payment of his indebtedness to the bank, or security, and compelled a transfer of his funds in bank. Held, that such transfer was a fraudulent preference which might be recovered by the assignee. *West Phila. Bk. v. Dickson et al., Assignee*, 17 B. R. 482.

A creditor receiving a payment of his debt from insolvent debtor without the consent of the surety or indorser, though it is afterward avoided by assignee and recovered by him, thereby releases the surety or indorser. *Northern Bk. of Ky. v. Cooke*, 18 B. R. 306.

Conveyance by a merchant to his wife of a large amount of property, made at a time when he was heavily indebted in a losing business, and pressed by his creditors, and when a withdrawal of this amount of property from his assets was likely to prevent his meeting his obligations, can not be supported by testimony that twenty years before his wife had advanced him money, without security or written obligation, under a simple verbal promise of repayment, which money he had invested in his own name and used to obtain credit in his business. *In re Antisdel*, 18 B. R. 289.

Mere fact that debtor bought or caused goods to be brought within reach of the execution a short time before the sheriff's sale, which was closely followed by proceedings in bankruptcy against him, is not sufficient to invalidate the sale. *Louchheim v. Henzey*, 18 B. R. 173.

Where a sale has been made under two judgments, it is not invalidated by fact that the debtor, with a desire to prefer either plaintiff, failed to make a defense which by law he was entitled to make. *Ibid.*

Where, after a general assignment for creditors has been made, a judgment is recovered in the ordinary course of practice, and without collusion between the debtor and creditor for the purpose of giving priority, such judgment and levy under it are good, even as against an assignee in bankruptcy subsequently appointed. *Dolson et al. v. Kerr*, 16 B. R. 405.

The bankrupts mortgaged certain personal property to S. to secure him as their indorser, and he assigned the mortgage to defendant as security for a debt. The bankrupts subsequently, and within four months of the commencement of proceedings against them, made a second mortgage to one G., the proceeds of which were given to S., who used them to pay off certain notes of the bankrupts which had been indorsed by the mortgagees in both mortgages. The equity of redemption was then sold for a certain sum, of which defendant received part and G. the balance, and both mortgages were released. The assignees having recovered judgment against G. for the value of the property covered by his mortgage, and such judgment having been satisfied, and an action against G. for the preference obtained by him when the notes were paid having been settled: Held, that such proceedings against G. did not estop the assignees from maintaining an action against defendant to recover the moneys received by him under his mortgage. *Sessions v. Johnson*, 17 B. R. 64.

Bankruptcy act does not forbid the creditor of an insolvent debtor to take a contract or covenant from any third party, in consideration of forbearance to institute proceedings in bankruptcy against such debtor. Such a transaction is not a violation of the act or of public policy, but if such creditor has received a transfer of property from the debtor, having at the time knowledge or reasonable cause to believe the debtor to be then insolvent, the contract is without consideration, and there can be no recovery upon it. *Ecker v. McAllister*, 17 B. R. 42.

A bank purchased a quantity of its stock on the market, and, not having the right to hold it in its own name, divided it among some of the directors. The bankrupt B., who was one of the directors, took some of this stock and gave his note therefor, the bank retaining the certificate for him, although the stock was transferred to him on the books and he received dividends thereon. On his fallure, the bank caused him to transfer the stock to its teller, but retained the note as an asset. In an action by the assignee to set aside the transfer as a preference; Held, that the bank had lawfully no stock to convey, and that B. was not the lawful owner. *Meyers v. Valley Nat. Bk.*, 18 B. R. 34.

In order to render a transfer void, it is not enough to merely show that the grantee knew that the grantor was insolvent. *Campbell v. Waite*, 16 B. R. 93.

The day on which the petition was filed must be excluded in making the computation of the time that a preference must stand in order to be valid. *Dutcher v. Wright*, 16 A. L. J. 100.

**Rules of Construction.**—Sections 5128 and 5021 are very nearly related to each other in their provisions, and must be construed together in *pari materia*. Section 5128 in express language applies equally to voluntary and involuntary cases. Therefore all the qualifications and conditions prescribed by section 5128, not inconsistent with the provisions of section 5021, will apply to proceedings under the latter section; and all the qualifications, conditions, and prohibitions of section 5021, so far as they relate

to the same class of matters provided for by section 5128, and are not inconsistent with its provisions, will apply to proceedings under section 5128. In *re Tonkin & Trewartha*, 4 B. R. 52; s. c. 1 L. T. B. 232; s. c. 3 L. T. B. 221; in *re Richter's Estate*, 4 B. R. 221; s. c. 1 Dillon, 544; in *re Black & Secor*, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39; *Wadsworth v. Tyler*, 2 B. R. 316; s. c. 2 L. T. B. 28.

It is the intention of the bankruptcy act to prevent all preferences by an insolvent person, and, as far as possible, to insure the equal distribution of his property to all his creditors. It differs in a material point from the act of 1841. By the second section of that act, to render a transfer void it must have been made "in contemplation of bankruptcy." The present act only requires "insolvency, or contemplation of insolvency." In *re Arnold*, 2 B. R. 160; *Haughey v. Albin*, 2 B. R. 399; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47; *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; in *re Kingsbury et al.*, 3 B. R. 318.

It is as much the policy of the bankruptcy act to uphold liens and trusts when valid, as it is to set them aside when invalid. In *re Wynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116; *Coggeshall v. Potter*, 4 B. R. 73; s. c. 6 B. R. 10; s. c. 1 Holmes, 75.

**What Facts Bring a Transfer Within the Provisions of this Section.**—This section is designed to defeat a preference to a creditor, while the next is designed to defeat any transfer of property. To make a transfer void, the following facts must concur:

- 1st. The debtor making the transfer must be insolvent.
- 2d. If the transfer gives a preference, it must have been made with a view to give a preference to the creditor.
- 3d. In any event, the person receiving the transfer must, at the time, have reasonable cause to believe the person making the transfer to be insolvent; and.
- 4th. Must also know that such transfer was in fraud of the provisions of the bankruptcy act.
- 5th. And the payment, pledge, assignment, transfer, or conveyance must be made within four months before the filing of the petition by or against the bankrupt. *Toof v. Martin*, 6 B. R. 49; s. c. 13 Wall. 40; *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; in *re Josiah D. Hunt*, 2 B. R. 539; s. c. 1 C. L. N. 169; *Street v. Dawson*, 4 B. R. 207; s. c. 1 L. T. B. 369; *Haughey v. Albin*, 2 B. R. 399; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47; *Scammon v. Cole*, 5 B. R. 257; *Forbes v. Howe*, 102 Mass. 427; *Dow v. Sargent*, 15 N. H. 115; *Rice v. Melendy*, 41 Iowa, 335.

These things must concur. They must concur not only in fact but in time. The debtor must be insolvent, or contemplating insolvency, when the alleged preference is given, and he must then have in view the giving of a preference. The unlawful view to a preference must coexist with the preference. It is not enough that it precedes or follows the preference. *Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 10 Blatch. 204; s. c. 21 Wall. 369.



If the debtor did not intend to give a preference, and the creditor did not have reasonable cause to believe the debtor to be insolvent, the transfer is valid, although the debtor was then insolvent. *Mays v. Fritton*, 11 B. R. 229; s. c. 20 Wall. 414.

This section does not render a sale *ipso facto* void. Upon an issue of title between the assignee and vendee, it is incumbent upon the former to first show a sale, and a sale within the time limited, and its unusual character. *In re Josiah D. Hunt*, 2 B. R. 539; s. c. 1 C. L. N. 169; *in re Hafer & Bros. (in re Beck)*, 1 B. R. 586; s. c. 6 Phila. 474.

The proceedings and judgment on the petition in involuntary bankruptcy against an insolvent debtor do not, in any manner, affect or determine any question involved in a suit brought by the assignee of that debtor's estate against a preferred creditor. *In re Drummond*, 1 B. R. 231; s. c. 1 L. T. B. 7; *in re Dibblee et al.*, 2 B. R. 617; s. c. 3 Ben. 283; *in re Schick*, 1 B. R. 177; s. c. 2 Ben. 5; s. c. 1 L. T. B. 28; *in re Dunkle & Driesbach*, 7 B. R. 72; *Lewis v. Sloan*, 68 N. C. 557; *Love v. Love*, 21 Pitts. L. J. 101; *Atkinson v. Farmers' Bank*, Crabbe, 529; *Brooke v. Scoggins*, 11 B. R. 258; s. c. 9 Pac. L. R. 12.

A conveyance may be an act of bankruptcy in the grantor, although no fraudulent intent is known to or participated in by the grantee. There is an important difference between our statute and the English law in this respect. In our system the title of the assignee relates only to the filing of the petition, and not to the act of bankruptcy, except when that act is the filing of a voluntary petition. It follows that an adjudication does not, *per se*, affect the title of a purchaser. *In re Williams & Co.*, 3 B. R. 286; s. c. Lowell, 406; s. c. 2 L. T. B. 100.

When there is no transfer or conveyance from the bankrupt to the holder of the property, the assignee will derive no aid from this clause. *Winslow v. Clark*, 47 N. Y. 261; s. c. 2 Lans. 377.

ACT OF 1898, CH. 1, SEC. 1. \* \* \* **Insolvency, what is?**—(15)  
A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.

**Insolvency.**—The term insolvency is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and its popular meaning. But it is also used, in a more restricted sense, to express the liability of a party to pay his debts as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent; and, as applied to them, it is the sense intended by Congress. With reference to other

persons not engaged in trade or commerce, the term may, perhaps, have a less restricting meaning. The bankruptcy act does not define what shall constitute insolvency, or the evidence of insolvency in every case. *Toof v. Martin*, 6 B. R. 49; s. c. 4 B. R. 488; s. c. 13 Wall. 40; s. c. 1 Dillon, 203.

Insolvency, as used in the bankruptcy act, does not mean an absolute inability to pay one's debts, at a future time, upon a settlement and winding up of all a trader's concerns; but a trader may be said to be in insolvent circumstances when he is not in a condition to pay his debts in the ordinary course of business, as persons carrying on trade usually do. *Sawyer v. Turpin*, 5 B. R. 339; s. c. 13 B. R. 271; s. c. 91 U. S. 114; s. c. 1 Holmes, 251; *Merchants' National Bank of Hastings v. Truax*, 1 B. R. 545; s. c. 1 L. T. B. 73; in re *Gay*, 2 B. R. 358; s. c. 1 L. T. B. 73; in re *J. B. Wright*, 2 B. R. 490; *Wadsworth v. Tyler*, 2 B. R. 316; s. c. 2 L. T. B. 28; *Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520; *Scammon v. Cole*, 3 B. R. 393; s. c. 2 L. T. B. 103; *Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186; *Adon.*, 1 Pac. L. R. 173; in re *Forsyth & Murtha*, 7 B. R. 174; in re *Walton*, 1 Dendy, 442; *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584; *Webb v. Sachs*, 15 B. R. 168; s. c. 9 C. L. N. 156; s. c. 13 Pac. L. R. 28; *Platt v. Stewart*, 13 Blatch. 481; *Stanley v. Sutherland*, 16 A. L. Reg. 298.

So far as a case depends upon proof that a debtor was insolvent in fact at the time of giving a preference, it is not enough to show that there was danger of insolvency as a coming result. *Beals v. Quinn*, 101 Mass. 262.

Perhaps no precise rule can be laid down which will be applicable to all cases, inasmuch as the determination of each case rests largely upon its own peculiar facts. It is generally held by the bankruptcy courts that a trader who is not able to pay all his debts in the usual and ordinary course of business, as persons carrying on trade usually do, is insolvent within the meaning of the bankruptcy law, and there is no better general rule to govern courts when they are considering the facts of a case. It is neither too broad nor too narrow; while it would be quite too narrow and restricted to hold that failure to pay some one debt when due is evidence of insolvency in all cases under the act. Whether a single instance of nonpayment of a debt at maturity would be evidence in a given case of insolvency depends somewhat upon the magnitude of the debt, the locality of the debtor, and what is the ordinary course of business and custom, in that respect, of the locality where the debtor resides, and upon such other facts and circumstances as will bear upon the question of insolvency. A different course would ignore the usage and course of business recognized between the debtor and creditor class in that particular locality, and would present the spectacle of the mercantile class saying the trader is solvent, and the courts saying he is insolvent; whereas the courts, upon such questions, should adopt the mercantile usage as the rule of decision. The question is whether the debtor or trader is able to pay his debts in the ordinary course, as persons carrying on trade there usually do. Hence it may be, and undoubtedly is, true that insolvency

in commercial centers is not insolvency in small country towns. In the former places, if the debtor's paper is dishonored, his credit is gone, and he is *prima facie* insolvent; whereas, in the latter localities, it is not so. Insolvency is a fact, and not a matter of definition or rule of law; and what is evidence of insolvency in London or Paris, or New York, is not evidence of insolvency everywhere. *Driggs v. Moore, Foote & Co.*, 3 B. R. 602; s. c. 1 Abb. C. C. 440; *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584; *Lakin v. First Nat'l. Bank*, 15 B. R. 476; s. c. 13 Blatch. 83.

A debtor is legally insolvent when he has not sufficient property subject to execution to pay all his debts if sold under legal process, and commercially insolvent when he has not the means to pay off and discharge his commercial obligations as they become due in the ordinary course of business. *Harrison v. McLaren*, 10 B. R. 244; *Smith v. McLean*, 10 B. R. 260.

Although there may be outstanding claims against a person which he has not the money in hand wherewith to pay, yet he can not be declared insolvent when, on the other hand, it does not appear that any of these were then due under the arrangements and understanding between him and his creditors, while it does appear that all the property and effects, in procuring which these debts have been contracted, and some \$5,000 of his own earnings which had been expended, are still in his possession, uninjured and undecayed; that his health is as vigorous, his skill as unquestioned, his character as untarnished, his credit as good, his friends as numerous and zealous, and, finally, the business enterprise in which he has just engaged as promising, in prospectu, as ever before. *Coggeshall v. Potter*, 4 B. R. 73; s. c. 6 B. R. 10; s. c. 1 Holmes, 75.

A merchant having no property but his stock in trade, who, when pressed for a debt admitted to be just, gives as a reason, that he is unable to pay it, and suffers judgment to be rendered against him, is insolvent within any accepted or sound definition of that term as used in the bankruptcy act, although the stock in trade may, at cost price or cash value, could it be sold for what it is worth, equal or exceed the trader's liabilities. *Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473.

The commission of an act of bankruptcy is considered as a test of insolvency, showing conclusively the inability of the debtor to pay his debts or carry on his trade. *Shawhan v. Wherritt*, 7 How. 627.

Suspension of commercial paper for more than fourteen days, is, of itself, in the case of a merchant, proof of insolvency. *Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473.

The statute does not require that the debtor should know that he is insolvent at the time of making the transfer to invalidate the transaction. It only requires the existence of the fact of insolvency to bring it within the scope of this section, if the other elements contemplated by the statute to render the transaction a nullity coexist. *Haughey v. Albin*, 2 B. R. 300; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47; *Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186; *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584; *in re Clark & Daughtrey*, 10 B. R. 21.

The fact that a paper secured by a deed of trust is permitted to remain past due for a length of time, indicates either a virtual renewal of the loan or consent given, and does not, therefore, necessarily subject the debtor to the penalties of the act. *Tiffany v. Lucas*, 5 B. R. 437; s. c. 8 B. R. 49; s. c. 1 Dillon, 164; s. c. 15 Wall. 410.

A bank suspending payment, and closing its doors against its creditors, makes to the world a proclamation of its insolvency. *Markson v. Hobson*, 2 Dillon, 327.

When a composition agreement contains a provision that it is not to be binding on any one unless it shall be agreed to and signed by all of the creditors, it is not binding on any of the creditors unless all accept it, and will not relieve the debtor from insolvency. *Kinzing v. Bartholew*, 1 Dillon, 155.

In estimating the liabilities of the bankrupt, the mere fact that some of them have been merged in judgments since the transfer will not affect the validity of the transfer, for the judgment is neither a payment nor satisfaction of the debt. *Burpee v. Nat'l. Bank*, 9 B. R. 314; s. c. 5 Biss. 405.

Contemplation is not used in the sense of meditation merely. It refers to the condition of a debtor who knows he will not be able to pay his debts as they become due, or who does not expect or intend to do so. *Paige v. Loring*, 1 Holmes, 275.

But little reliance can be placed by the court upon the statement of the bankrupt that, at the time of the transfer, he had no reason to believe himself insolvent, for he may not be aware of the legal definition of insolvency. *Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520; *Scammon v. Cole*, 3 B. R. 393; s. c. 2 L. T. B. 103; *Warren v. Tenth Nat'l. Bank*, 7 B. R. 481; s. c. 10 Blatch. 493.

The question whether or not the preference was made at a time when the bankrupt was insolvent, should be submitted to the jury. *Pierce v. Evans*, 61 Penn. 415.

If the quantity and value of the bankrupt's assets did not materially diminish from the time of the transfer till the commencement of the proceedings in bankruptcy, the jury may find that he was insolvent when he made the transfer. *Clarion Bank v. Jones*, 11 B. R. 381; s. c. 21 Wall. 325; s. c. 2 A. L. T. (N. S.) 135.

The bankrupt may be asked whether on the day of the transfer he believed himself insolvent. *Otis v. Hadley*, 112 Mass. 100.

Evidence of the amount of property in the possession of the bankrupt within a few days after the transfer is admissible. *Ibid.*

Evidence of the general signification of the word "insolvent" in the place where the transaction occurred is not competent. *Stanley v. Sutherland*, 16 A. L. Reg. 298.

Statements made by the bankrupt in regard to his condition at the time of getting the money are not admissible in favor of the defendant. *Goodrich v. Wilson*, 11 B. R. 555; s. c. 119 Mass. 429.

**Limitation as to Time.**—The acts mentioned in this section are not such as were forbidden by the common law or generally by the statutes of the States. Nor are they acts which, in their essential nature, are immoral or

dishonest. Although a preference of creditors of an insolvent may sometimes be unjust to other creditors, it is not morally wrong. But the framers of the bankruptcy act were about to prepare a system of law, the main feature of which was to provide for the distribution of the property of an insolvent debtor among his creditors, and they adopted, wisely, as the general and prevailing rule of distribution, equality among the creditors. But they found that the general principle could not, without hardship, be made of universal application. When a creditor had obtained, by fair means, a lien upon any property of the bankrupt, that lien ought to be respected. If he had so obtained payment of the whole or a part of his debt, the payment ought to stand. These exceptions to the general rule of distribution were, however, liable to be abused, and might be used to defeat the purpose of the bankruptcy law. Congress, therefore, adopted a conventional rule to determine the validity of preferences. In all cases where an insolvent pays or secures a creditor to the exclusion of others, and that creditor is aware that it is so when he receives the preference, he must run the risk of the debtor's continuance in business for four months. If the law which requires equal distribution is not called into action for four months, the transaction, being otherwise honest, will stand; but if, by the debtor himself, or by any of his creditors, the law is invoked within four months, the transaction will not stand, but the money or property received by the party becomes a part of the common fund for distribution. *Bean v. Brookmire et al.*, 4 B. R. 196; s. c. 1 Dillon, 24.

After the lapse of four months, the preferences — simple preferences — which an insolvent debtor may have made, are to be held valid as against all the world, so far as the preferred creditor is concerned. In this respect there is no difference between cases of voluntary and cases of involuntary bankruptcy. *Coggeshall v. Potter*, 4 B. R. 73; s. c. 6 B. R. 101; s. c. 1 Holmes, 75; in re Wynne, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116; in re Price Fuller, 4 B. R. 115; s. c. 1 Saw. 243; *Bean v. Brookmire*, 4 B. R. 196; s. c. 1 Dillon, 24; in re Butler, 4 B. R. 303; s. c. Lowell, 506; *Maurer v. Frantz*, 4 B. R. 431; s. c. 8 Phila. 505; *Hubbard v. Allaire Works*, 4 B. R. 623; s. c. 7 Blatch. 284; *Hall v. Hayner*, 3 C. L. N. 402; *Collins v. Gray*, 4 B. R. 631; s. c. 8 Blatch. 483; *Israel v. Ayer*, 2 Rich. (N. S.) 244; *Hilslop v. Hoover*, 68 N. C. 141; in re G. H. Lane & Co., 10 B. R. 135; *Sidener v. Klier*, 4 Biss. 391; *Dennet v. Mitchell*, 6 Law Rep. 16; s. c. 1 N. Y. Leg. Obs. 356; *Shearman v. Bingham*, 1 Holmes, 272.

The assignee may have a preference set aside which was given by the directors of an insolvent corporation to a firm of which a director was a member, although it was given more than four months before the commencement of the proceedings in bankruptcy. *Bradley v. Farwell*, 1 Holmes, 433.

A deed of trust executed prior to, but recorded within the period of four months before the commencement of proceedings in bankruptcy, is valid. Although it did not take effect until the time of record as against creditors, it is not for that reason void. The recording of the deed was not the act of the bankrupt. The deed, as against him, was operative from its date. It was then that all his interest in the property described

in it became vested by way of security in the grantee. It was then that he delivered the deed and parted with all control of it. If the beneficiary was satisfied with the security afforded by the deed unrecorded, there was neither necessity nor obligation to record it. To record it was only necessary to make it a valid security against other creditors; and it was not for the bankrupt but for the creditor secured, to determine whether it should be recorded or not. The delivery of it for record was in no sense his act, but theirs. The preference which the law condemns is a preference made within the limited time by the bankrupt, and not a priority lawfully gained by a creditor; and the preference gained by the record was not a preference made by the bankrupt. Moreover, the law which makes deeds of trust void "until and except from" the time of record clearly makes them valid from that time. *In re Wynne*, 4 B. R. 23; s. c. Chase, 227; s. c. 2 L. T. B. 116; *Seaver v. Spink*, 8 B. R. 218; s. c. 65 Ill. 441; *Cragin v. Carmichael*, 11 B. R. 511; s. c. 2 Dillon, 519; *Folsom v. Clemence*, 111 Mass. 273.

A deed made and delivered before, but acknowledged within four months prior to the commencement of proceedings in bankruptcy, is valid when it is valid under the State laws without an acknowledgment after it is recorded. *Seaver v. Spink*, 8 B. R. 218; s. c. 65 Ill. 441; *Gibson v. Warden*, 14 Wall. 244.

If a deed is sealed and delivered on one day, and acknowledged on a subsequent day, the time begins to run from the day of the delivery, and not from the time of the acknowledgment. *Wood v. Owings*, 1 Cranch, 239.

If an insolvent debtor conveys property to a creditor to hold in trust for such uses as shall be designated before a certain time in any composition between the debtor and the other creditors, but if no composition is made before that time, then absolutely to his own use, whereby the debt is to be discharged, the limitation runs only from the time so stipulated if no composition is made. *Haskill v. Frye*, 14 B. R. 525.

The ratification by one of the unauthorized act of another operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. If the depositary of a bond appropriates it to his own use, and substitutes other property in its place, without the authority of the bailor, the latter may ratify the act, although the bailee is insolvent at the time of the ratification. The ratification will be of the whole transaction, taken together, of the appropriation and substitution — not a part without the rest — not of the appropriation without the substitution. *Cook v. Tullis*, 9 B. R. 433; s. c. 18 Wall. 332.

If the debtor, without the knowledge of the creditor, places the amount of the debt in bank, and takes a certificate therefor in the name of the creditor, the ratification by the creditor will not relate back to the time of the deposit, if he is informed of the debtor's insolvency and of the deposit at the same time, for the rights of other creditors intervene as soon as the notice is given. *Strain v. Gourdin*, 11 B. R. 156; s. c. 2 Woods, 380.

If the president of a corporation executes a deed without authority, the

time will run from the ratification, and not from the date of the deed, for the law will not feign a fiction to make valid an invalid act, and the act of ratification to relate must take place at a time and under circumstances when the ratifying party may himself lawfully do the act which he ratifies. In *re Kansas City Manuf. Co.*, 9 B. R. 76.

If the creditor has previously agreed to receive grain in payment of his debt, the transfer dates from the time when the warehouse receipt is mailed to him. *Brooke v. Scoggins*, 11 B. R. 258; s. c. 9 Pac. L. R. 12.

If the creditor has not previously agreed to receive grain in payment of his debt, the transfer dates from the time when the receipt sent by mail is received and accepted by him. *Ibid.*

A preference given by a firm, of which only one member subsequently goes into bankruptcy, can not be avoided by the assignee of the bankrupt partner. The preference is not void unless given within the prescribed time before the commencement of proceedings in bankruptcy; and, being a joint act, the bankruptcy of both members must follow within the specified period, or the preference becomes merely the payment of a just debt. *Forsyth v. Merritt et al.*, 3 B. R. 48; s. c. Lowell, 336; s. c. 1 L. T. B. 168; in *re T. S. Shepard*, 3 B. R. 172; s. c. 3 Ben. 347.

If the surviving partners are put into bankruptcy without the firm's being declared bankrupt, the assignee can not set aside a preference made by the firm. *Withrow v. Fowler*, 7 B. R. 330; s. c. 5 Pac. L. R. 102.

If four months elapse after the giving of a firm note by a partner to pay a separate debt, before the bankruptcy of the firm, but less than four months before the bankruptcy of the partner, the transfer is valid. In *re G. H. Lane & Co.*, 10 B. R. 135.

**Intent to Prefer.**—The present bankruptcy act avoids a sale made with a view to give a preference, if the debtor at the time be in fact insolvent, although he may not contemplate bankruptcy. Under this statute the phrase "with a view to give a preference," must be construed so as to include an intent to give one creditor any advantage over others in respect to payment or security of his debt. *Forbes v. Howe*, 102 Mass. 427; in *re George & Proctor*, Lowell, 409.

Every one is presumed to intend what are the necessary and unavoidable consequences of his acts. *Haughey v. Albin*, 2 B. R. 390; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47; *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *Ahl et al. v. Thorner*, 3 B. R. 118; s. c. 2 Bopd, 287; s. c. 1 L. T. B. 129; *Brock v. Terrell*, 2 B. R. 643; *Sawyer v. Turpin*, 5 B. R. 339; s. c. 13 B. R. 271; s. c. 1 Holmes, 251; s. c. 91 U. S. 114; in *re Forsyth & Murtha*, 7 B. R. 174; in *re George & Proctor*, Lowell, 409; *Arnold v. Maynard*, 2 Story, 349; *Morse v. Godfrey*, 3 Story, 364; *Everett v. Stone*, 3 Story, 446; *Peckham v. Burrows*, 3 Story, 544; *Dennet v. Mitchell*, 1 N. Y. Leg. Obs. 356; s. c. 6 Law Rep. 16; *Webb v. Sachs*, 15 B. R. 168; s. c. 13 Pac. L. R. 28; s. c. 9 C. L. N. 156. Vide *Jones v. Howland*, 49 Mass. 377.

Every man is presumed to know the law, and he is bound to know what are the legal results of his acts. His mere private intention can not overcome the legal intention and purport of his acts. *Arnold v. Maynard*, 2 Story, 349; *Morse v. Godfrey*, 3 Story, 364.

When a debtor is insolvent and knows it, any payment then made by him to a creditor in full must be made with intent to prefer. *Driggs v. Moore, Foote & Co.*, 3 B. R. 602; s. c. 1 Abb. C. C. 440; *Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186; *in re Gregg*, 4 B. R. 456.

The intentions of parties are to be judged by the legal effect of their acts. *Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325; *Traders' National Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Bliss. 423; s. c. 14 Wall. 87.

The intent to prefer may be inferred from the fact of preference. *Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186.

It is not necessary that there should be an actual intent in the mind of the debtor. The intent may be inferred from circumstances. *Linkman v. Wilcox*, 1 Dillon, 161; *Giddings v. Dodd*, 4 B. R. 657; s. c. 1 Dillon, 115.

The intent with which an act is done is not ordinarily a matter of direct evidence, but of inference from the act and the surrounding circumstances. *In re George & Proctor, Lowell*, 409.

Motive and intent are not identical. An intent often exists where motive is wholly wanting and indifference exists. *Warren v. Tenth Nat'l. Bank*, 7 B. R. 481; s. c. 10 Blatch. 493; *Webb v. Sachs*, 15 B. R. 168; s. c. 13 Pac. L. R. 28; s. c. 9 C. L. N. 156.

It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer in any case by a debtor of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee. *Toof v. Martin*, 6 B. R. 49; s. c. 4 B. R. 488; s. c. 1 Dillon, 203; s. c. 13 Wall. 40.

The general legal proposition is true that, where a person does a positive act the consequences of which he knows beforehand, he must be held to intend those consequences. But it can not be inferred that a man intends, in the sense of desiring, promoting, or procuring, a result of other persons' acts when he contributes nothing to their success or completion, and is under no legal or moral obligation to hinder or prevent them. *Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473.

If the intent of the debtor is to give a legal quality to a transaction, it must be an intent accompanying an act done by himself and not an intent or purpose arising in his mind afterward, while third persons are acting. Where a judgment is obtained by means of a power of attorney, the inquiry as to his intent must be limited to the time when he executed the power. *Buckingham v. McLean*, 13 How. 151; s. c. 3 McLean, 185.

Some payments may be preferences though made in what seems to be the ordinary course of business, and others may not be though made out of it. It is a question of intent in each case. The mode in which payments are made is usually important, but only as evidence of intent. *In re George & Proctor, Lowell*, 409.



The act does not require the debtor to know of his insolvency or believe it. It treats of insolvency as a condition of fact, not of belief. He can not set up his ignorance of that condition to defeat the operation of this section. He is presumed to know and is chargeable with knowledge of it, and neither ignorance nor willful blindness will exonerate him from the operation of its provisions. When he is insolvent in fact, he is chargeable by law with knowledge of such condition, and it follows as a logical sequence, that if he pays or secures one creditor in full, not having enough to pay all, the transfer or payment necessarily operates as a preference, and he is held liable to intend the natural and logical consequences of his acts. *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584.

Every person is presumed to know his pecuniary condition. The presumption, however, may be rebutted, and a person may show that he was innocently mistaken as to his true condition, but the burden is upon the person setting up such a claim. *In re S. P. Warner*, 5 B. R. 414; *Sedgwick v. Sheffield*, 6 Ben. 21.

The intent may be inferred from the conduct of the debtor, and the circumstances of the transaction. *Beattie v. Gardner*, 4 B. R. 323; s. c. 4 Ben. 479.

The presumption that a man intends the natural and probable consequences of his acts is only one element of proof to establish the fact of actual intent. *Rice v. Grafton*, 13 B. R. 209; s. c. 117 Mass. 228.

The fact that the information in regard to the debtor's insolvency came from the debtor is no evidence of any wish or design on his part to give a preference, or of affording the creditor any facility for obtaining a judgment where the information was not given with that view or design. *Britton v. Payen*, 9 B. R. 445; s. c. 7 Ben. 219.

It is immaterial whether other debts were due and payable at the time when the preference was given or not. *Warren v. Tenth Nat'l. Bank*, 7 B. R. 481; s. c. 10 Blatch. 493.

The inevitable consequence of a mortgage upon a debtor's stock in trade is to put an end to further credit to him and break up and terminate his business. The natural and inevitable effect of thus incumbering his property is to give the secured creditors a fraudulent preference. *Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520; *Scammon v. Cole*, 3 B. R. 393; s. c. 2 L. T. B. 103.

A mortgage of all the property of a trader, or of so much as will make him insolvent, when given for a pre-existing debt, is such an apparent preference that it would be almost impossible to explain it away. *In re McKay & Aldus*, 7 B. R. 230; s. c. Lowell, 561.

When the debtor is in point of fact insolvent, it will require strong proof to repel the legal presumption that payments made by turning out and transferring an open account and delivering goods upon an order in favor of a third party, and also by delivering goods to be applied on the same order, not to the third party, but to the creditor himself, and which necessarily and obviously had the effect to give a preference to a creditor, were not intended to have that effect. *In re Kingsbury et al.*, 3 B. R. 318.

The giving of a note payable one day after date, with a warrant to confess judgment, importing the right to an execution without delay and a consequent levy, affords the strongest grounds for the presumption that the debtor intended that the creditor should make a levy, and thus obtain a preference. *Haughey v. Albin*, 2 B. R. 390; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47; in re *Hafer & Bro.* (in re *Beck*), 1 B. R. 586; s. c. 6 Phila. 474; *Clarion Bank v. Jones*, 11 B. R. 381; s. c. 21 Wall. 325; s. c. 2 A. L. T. (N. S.) 135.

It is to no purpose that a man says, when he is insolvent and signs a note and warrant of attorney and gives it to his creditor, the effect of which is to enable the creditor to enter the judgment, issue execution, and levy upon his property, that he did not intend to give a preference. Actions in this, as in so many other cases, speak louder than words, and the conclusion necessarily follows, from such a state of facts, that he does intend to do what is the necessary consequence of what he does; or according to the oft-repeated statement of the books, a man is supposed to know what is the necessary consequence of his acts. *Traders' National Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87.

The fact that the debtor did not consider that he was giving a preference by a judgment note, since he did not believe that a judgment and execution would be available as a preference over other creditors, does not affect the case, for the legal consequence of the note with warrant to confess judgment was an execution, levy and sale of the property to the exclusion of other creditors. In re *Terry & Cleaver*, 4 B. R. 126; s. c. 2 Biss. 356.

In order to give a struggling debtor the right to pay pressing debts or suffer some of his property to be levied on, he must know that his means are ample, his assets sufficient to pay all his debts, and his condition not one of merely technical insolvency. His struggle to meet his debts must not only be honest, but made with reasonable ground for expecting a successful issue. *Hyde v. Corrigan*, 9 B. R. 466; s. c. 7 Pac. L. R. 121; in re *Gregg*, 4 B. R. 456; *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584.

It does not rebut the intent to prefer to show that the debtor has also another motive to the proceeding, namely, expectation of future benefit to himself by means of future loans of money, and being enabled thereby to continue his business. *Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186.

A conveyance to secure an extension of indebtedness without any intention to give a preference is valid. *Booth v. Neely*, 12 B. R. 398.

The fact that the debtor was induced to give security for debts previously contracted, by the hope and expectation of thereby obtaining further credit and means for the continued prosecution of his business, does not make it any the less a preference. The fact that the debtor was influenced by some other consideration or inducement, beyond and aside from the purpose to secure an existing debt, is not such a circumstance as will repel the inference that he intended to give his creditor a preference. *Forbes v. How*, 101 Mass. 427.

It may be true that the bankrupt hoped to work out, and that one means to this end was to obtain time in which to pay his debts. But it is

wholly untenable to say that a trader who knows himself to be insolvent can mortgage his property to secure a pre-existing debt without entertaining the view that such action is a preference. The court must judge of the bankrupt's standing at the time of the transfer, and, if it appear that his condition was such that a mortgage must operate as a preference it can not be declared that there was no intention or view to give a preference because there was a possibility of his earning, in the future, enough to pay all his debts, and he hoped to do so. It matters not what was his principal motive, if he was actually insolvent, and knew it, he will not be allowed to pledge all his property, or any part of it, to one creditor, leaving the other creditors dependent, in whole or in part, upon his subsequent good or ill fortune in business enterprises. This view is in harmony with the spirit and intention of the bankruptcy act. Any other view renders its provisions as worthless as a rope of sand, and opens a door to evade one of its most salutary requirements. *Driggs v. Moore*, Foote & Co., 3 B. R. 602; s. c. 1 Abb. C. C. 440; *Hyde v. Corrigan*, 9 B. R. 466; 7 Pac. L. R. 121.

The purpose of the act being to enforce the equal distribution of an insolvent's estate, every act of an insolvent that tends to defeat that purpose should be construed strictly as against him, and courts should indulge every presumption that is permissible, according to well-settled rules of law, to secure the full benefit of the cardinal principle of the law. The act ought not to be construed to prevent the exercise of a reasonable bona fide effort on the part of an energetic and hopeful debtor struggling, with an honest intent to pay all his debts; but to allow every embarrassed debtor to go on and sustain his acts because he says he thought he could go through, and hold as valid his payments and securities, would be to defeat altogether the objects and provisions of the bankruptcy act. *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584; *in re S. P. Warner*, 5 B. R. 414; *Jones v. Howland*, 49 Mass. 377; *Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 10 Blatch. 204; s. c. 21 Wall. 360.

The transfer by a debtor who is insolvent of his property or a considerable portion of it, to one creditor as a security for a pre-existing debt, without making provision for an equal distribution of its proceeds to all his creditors, operates as a preference to such transferee, and must be taken as prima facie evidence that a preference was intended, unless the debtor or transferee can show that the debtor was, at the time, ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584.

The question being in each case whether there is an intent to prefer, there may be many cases in which the evidence of a real and honest intention not to stop payment may make valid a security, which is partly given for money previously advanced, if coupled with sufficient present advantages to the debtor; and there may even be cases where the purpose and expectation to keep on are so manifest that no intent to prefer can be found, though the insolvency is well known to both parties. *In re McKay & Aldus*, 7 B. R. 230; s. c. Lowell, 651.

The mere omission by an insolvent debtor, when he is sued for a just debt, to file a petition in bankruptcy, is not sufficient evidence of an intent to prefer or defeat the operation of the act. *Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473.

To make an effort by dilatory and false pleas to delay a judgment in a State court, when he is sued for a just debt and has no defense, is a moral wrong and fraud on the due administration of the law. There is no obligation on him to do this, either in law or in ethics. If the debtor neither hinders or facilitates a creditor in the prosecution of his suit, an intent to prefer can not be inferred from his conduct. *Ibid*.

There is no legal or moral obligation upon an insolvent, when sued by one creditor in ordinary proceeding likely to end in judgment and seizure of property, to file a petition in voluntary bankruptcy. The voluntary clause is wholly voluntary. No intimation is given that the bankrupt must file a petition under any circumstances. *Ibid*.

It is wholly immaterial whether the preference was voluntary, or by reason of threats and coercion. The voluntary or involuntary character of the transaction is not important. It is a conclusive presumption of the English law that a debtor who pays an honest debt with a part only of his assets does not commit a technical fraud which will render the payment void, if the act is done in consequence of threats or demands on the part of the creditor. Our law does not adopt this presumption as conclusive. It defines a preference in the statute itself, or, rather, it has language which is inconsistent with the English definition. It makes the intent to prefer or give an advantage to one creditor the important thing, and this may, evidently, concur with pressure on the part of the creditor. *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *Wilson v. Brinkman*, 2 B. R. 468; s. c. 1 C. L. N. 193; in re *Batchelder*, 3 B. R. 150; s. c. Lowell, 373; *Giddings v. Dodd*, 4 B. R. 657; s. c. 1 Dillon, 115; *Sawyer v. Turpin*, 5 B. R. 399; s. c. 13 B. R. 271; s. c. 91 U. S. 114; s. c. 1 Holmes, 251; in re *McKay & Aldus*, 7 B. R. 230; s. c. Lowell, 561; *Clarion Bank v. Jones*, 11 B. R. 381; s. c. 21 Wall. 325; s. c. 2 A. L. T. (N. S.) 135; *Atkinson v. Farmers' Bank*, Crabbe, 529; *Webb v. Sachs*, 15 B. R. 168; s. c. 13 Pac. L. R. 28; s. c. 9 C. L. N. 156. Vide *Ashley v. Steere*, 2 W. & M. 347; *McMeehen v. Grundy*, 3 H. & J. 185; *Taylor v. Whitthorn*, 5 Humph. 340; *Phoenix v. Ingraham*, 5 Johns. 412; *Wilkinson's Appeal*, 44 Penn. 284.

An agreement for a future security is a mere executory contract, and not a conveyance, and the validity of such security will depend entirely upon the circumstances under which it is made, and the state of things existing at that time. An agreement to give security for a debt due or to be contracted, imposes no higher legal obligation upon the debtor than his promise of payment involved in the contracting of the debt. His fulfillment of the one is equally open to objection as a preference as is his fulfillment of the other. *Forbes v. Howe*, 102 Mass. 427; *Second National Bank v. Hunt*, 4 B. R. 616; s. c. 11 Wall. 391; *Sawyer v. Turpin*, 5 B. R. 399; s. c. 13 B. R. 271; s. c. 91 U. S. 114; s. c. 1 Holmes, 251; *Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520; *Harvey v. Crane*, 5 B. R. 218;

s. c. 2 Biss. 496. Contra, in re J. P. Wood, 5 B. R. 421; in re McKay & Aldus, 7 B. R. 230; s. c. Lowell, 561; in re Connor & Hart, Lowell, 532. Vide *McMechen v. Grundy*, 3 H. & J. 185.

When an agreement is made that certain and specific property shall be conveyed, and the conveyance is made within a reasonable time thereafter, the advance is considered as a present consideration for the conveyance. *Gattman v. Honea*, 12 B. R. 493; s. c. 7 C. L. N. 395; s. c. 10 Pac. L. R. 4.

A mortgage upon real estate executed immediately before the commencement of proceedings in bankruptcy, in pursuance of a parol agreement made long before that time, is not a preference, and is valid as against the assignee of the mortgagor. *Burdick v. Jackson*, 15 B. R. 318; s. c. 14 N. Y. Supr. 488.

A conveyance of land in pursuance of a previous agreement, when there has been an actual possession under the agreement, and performance of it, can not be set aside, although the consideration was paid prior to the transfer. *Post v. Corbin*, 5 B. R. 11.

If the promise to give security was merely general, without relating to any specific property, a transfer in pursuance thereof would be a preference. In re *Jackson Iron Manuf. Co.*, 15 B. R. 438; s. c. 2 C. L. B. 154.

Where the contract of sale contemplates that the payment and transfer shall be synchronous, the vendee does not receive a preference by accepting a transfer immediately after making the payment, although the vendor in the interval becomes insolvent. *Sparhawk v. Richards*, 12 B. R. 74.

A security fairly given as part of the same transaction is valid, as the loan can not be invalidated by a change of the borrower's situation *re infecta*; as if the money were advanced while the mortgage was in course of preparation, and the debtor fails in the meantime. In re *McKay & Aldus*, 7 B. R. 230; s. c. Lowell, 561; in re *Connor & Hart*, Lowell, 532; in re *Perrin & Hance*, 7 B. R. 283.

As a mortgage of property to be acquired after the date of its execution is not a valid mortgage, but merely an authority to take possession, the right of creditors under the bankruptcy law must depend upon its effect upon the property at the time the act was done which might be supposed to operate as a transfer. This was the taking of possession under the license contained in the mortgage. It is not competent for a party to give his authority in relation to property which he may afterward acquire, and thus prefer a creditor who shall take possession when he is known to be insolvent, and thus avoid the effect of the bankruptcy law, because, literally, he has not made a transfer. That would be a facile method of evading the scope and spirit of the law. In legal effect the transaction was a continuing act from the date of the authority to the taking of possession, the last act being the consummation of the transfer. It must be treated as if a mortgage were made of the after-acquired property at the time the mortgagee took possession. In re *Eldridge*, 4 B. R. 498; s. c. 2 Biss. 362; *Smith v. Ely*, 10 B. R. 553; *Robinson v. Elliott*, 11 B. R. 553; s. c. 32 Wall. 513.

A mortgagee who has omitted to record his mortgage obtains a preference if he takes possession of the goods with the assent of the debtor, for he has no greater right to take possession than any general and unsecured creditor. *Kane v. Rice*, 10 B. R. 469.

If a bill of sale under the laws of the State vests a complete title in the grantee, although it is not recorded or attended by possession, subject, however, to be defeated by any intervening right before record is made or possession taken, it will constitute a valid consideration for a mortgage, although there was an agreement that it should be kept secret and not recorded. *Sawyer v. Turpin*, 5 B. R. 339; s. c. 13 B. R. 271; s. c. 91 U. S. 114; s. c. 1 Holmes, 251.

A mortgage is not a preference where the debt is secured by a prior mortgage covering goods subsequently acquired, if both mortgages cover the same goods. *Brett v. Carter*, 14 B. R. 301.

Where a subsequent and a prior mortgage do not cover the same goods, the former is liable to be set aside as a preference as to all goods not included in the latter. *Brett v. Carter*, 14 B. R. 301; *Barron v. Morris*, 14 B. R. 371; s. c. 2 Woods, 354.

A chattel mortgage is not rendered invalid as against the assignee by failure to file the same or take possession of the property until a month before the commencement of proceedings in bankruptcy, although the mortgagee then knew the mortgagor to be insolvent, and that the instrument gave him a preference. *In re Abram Barman*, 14 B. R. 125.

Where the consequences of an act are penal and a fair and honest motive is as consistent with the act as a fraudulent one, the former is to be presumed to be the real and true one. *Ashby v. Steere*, 2 W. & M. 347.

If the payment is received in pursuance of an offer to compromise made to all the creditors, the intent to prefer may be shown by evidence that he was either unable or unwilling to carry out the compromise. If he is able and willing to treat all alike the intent is not made out. *Clark v. Skilton*, 20 L. R. R. 175.

If the bankrupt has procured one of his debtors to execute a mortgage, and transfer property to a creditor, the transaction will be deemed a preference, although there was no express agreement that the indebtedness due to the bankrupt should constitute the consideration therefor. *Smith v. Little*, 9 B. R. 11; s. c. 5 Biss. 269.

A preference, within the meaning of the act, is an advantage in the payment of the debt due to him acquired by one creditor over the other creditors of the debtor. *In re Joseph Horton et al.*, 5 Ben. 562.

Where the by-laws of a stock board provide that the seat of any member who has failed to comply with his contracts with other members of the board for six months shall be sold, and the proceeds of the sale applied to the payment of his creditors in the board, an assignment of the seat before the expiration of the six months, for the purpose of facilitating such payment, is not a preference, because the general creditors can not obtain any greater rights of property than the debtor himself possesses. *Hyde v. Woods*, 10 B. R. 54; s. c. 15 B. R. 518; s. c. 2 Saw. 655.

A release of the equity of redemption to the mortgagee, who agrees to take the property at a fair price, and credit the amount on the mortgage debt, for the purpose of saving the expense of a foreclosure, is not a preference, when the property is worth less than the mortgage debt. *Coxe v. Hale*, 8 B. R. 562; s. c. 10 Blatch. 56; *Catlin v. Hoffman*, 9 B. R. 342; s. c. 2 Saw. 486.

Where the lien is greater in amount than the value of the property, the more reasonable inference is that money paid by the lien creditor at the time of the conveyance was paid to obtain the conveyance rather than as a consideration for the property. *Catlin v. Hoffman*, 9 B. R. 342; s. c. 2 Saw. 486.

The preference at which the law is directed can only arise in case of an antecedent debt. The giving of a security when the debt is created, is not within the law, and if the transaction be free from fraud in fact, the party who loans the money can retain it until the debt is paid. *Tiffany v. Boatman's Sav. Inst.*, 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 14; s. c. 18 Wall. 376; *Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 21 Wall. 360; s. c. 10 Blatch. 204; *Bentley v. Wells*, 61 Ill. 59; in re *Thomas Morrison*, 10 B. R. 106; s. c. 6 C. L. N. 110; *Piper v. Brady*, 10 B. R. 517; s. c. 31 Leg. Int. 316.

The exchange of one set of securities for another of equal value is not a preference. *Burnhise v. Firman*, 11 B. R. 506; s. c. 22 Wall. 170.

A creditor and debtor have a right to state an account and strike a balance, although the former may know that the latter is then insolvent. A mere accounting between the parties does not prefer the creditor or diminish the assets of the debtor. In re *Comstock & Co.*, 12 B. R. 110; s. c. 3 Saw. 320.

The giving of a check on deposits in a bank, to be applied on a note held by the bank, is not payment, but an adjustment of accounts, and does not constitute a preference. *Hough v. First Nat. Bank*, 4 Biss. 349.

If a mortgage is executed to secure an indorser at the time of the discounting of a note by a national bank, an assignment of the mortgage to the bank is not a preference, for the bank in equity was entitled to the benefit of the mortgage from the time of discounting the note. *First Nat'l. Bank v. Haire*, 36 Iowa, 443.

If a creditor has a lien on the property of the debtor to the full amount of his debt, there is no preference in paying money to discharge it. *Livingston v. Bruce*, 1 Blatch. 318.

The mere consent of the debtor to the revival of a judgment so as to continue the lien thereof, does not constitute reasonable cause to believe him to be insolvent. *Kemmerer v. Tool*, 12 B. R. 334; s. c. 78 Penn. 147.

Where goods are sold for cash on the receipt of the invoice, the nonpayment of the price warrants a rescission, and such rescission is not a preference. In re *Norman B. Foot*, 11 B. R. 153; s. c. 11 Blatch. 530.

The surrender of a pledge by another creditor upon a promise by the preferred creditor to pay him out of the proceeds of the property, does not affect the validity of the transfer. *Ogden v. Jackson*, 1 Johns. 370.

A mortgage upon a homestead or other exempt property can not be set aside by the assignee, although it would have been a preference if put upon other property. *Rix v. Capitol Bank*, 2 Dillon, 367; *Schlitz v. Schatz*, 2 Biss. 248.

If the individual property exceeds the individual liabilities, a mortgage to an individual creditor can not be set aside, although the firm is insolvent. *Hewitt v. Norton*, 16 B. R. 27; s. c. 16 N. Y. Supr. 277.

The assignee of the firm may assail a transfer of property purchased by one partner in the name of his wife, with the firm money, and conveyed to a firm creditor, with the intent to give a preference. *Patrick v. Bank*, 1 Dillon, 303.

A transfer of property to a factor, with intent to give him a preference by enabling him to claim a factor's lien thereon, is void. *Nudd v. Burrows*, 13 B. R. 289; s. c. 91 U. S. 426.

A transfer of property within the United States to prefer an alien creditor may be set aside in the courts in the United States. *Olcott v. Maclean*, 14 B. R. 379; s. c. 50 How. Pr. 455.

If an insolvent debtor conveys his property to another, and the latter executes a mortgage thereon to a creditor, the transfer may be set aside, for the legal effect is the same as if the mortgage had been given directly by the debtor himself. *Gibson v. Doble*, 14 B. R. 157; s. c. 5 Biss. 198.

If a depositary of a bond, at the time of appropriating it to his own use, puts other property in its place, the transaction is not a preference of one creditor over another, within the meaning of the bankruptcy act. There is no loan made or credit given. It is a case of an exchange of one species of property for another, made by one party without authority from the other, or of the conversion to his use by the depositary of property in his hands, and substituting property equivalent in value as the investment of the property converted. *Cook v. Tullis*, 9 B. R. 433; s. c. 18 Wall. 332.

An agreement at the time of discounting a note that a part of the proceeds shall be held to meet the note at maturity, is not a preference, or void under the bankruptcy law. *First National Bank of Mount Joy v. Wilson*, 72 Penn. 13.

A contract for a conditional delivery of goods gives no just cause of complaint to the creditors of the vendee. *Sawyer v. Turpin*, 5 B. R. 339; s. c. 13 B. R. 271; s. c. 91 U. S. 114; s. c. 1 Holmes, 251.

A change in the form, or even in the substance, of securities will be protected, if no greater value is put into the creditor's hands than he had before. *Ibid.*

When an insolvent bank holds a protested note, and has on deposit funds of an indorser sufficient to pay it, the money may be appropriated on the note, and the note delivered to the indorser. The fact that the indorser subsequently collects the amount from the maker is immaterial. Creditors can not question the right of the indorser to take up the note by payment or set off, and they have no interest in his remedy over against the maker. *Winslow v. Bliss*, 3 Lans. 220.



It is well settled that payment in full to a creditor of a bankrupt by a third person, as a friendly act, is not an illegal preference as between the creditor so paid and the other creditors, because it in no way affects the other creditors. The fund to which they looked for payment is in no way diminished by it. *Repplier v. Bloodgood*, 1 Sweeny, 34; *Winsor v. Kendall*, 3 Story, 507.

One person has the right to transfer his property to pay or secure the debt of another. Such a preference is not a preference given by the debtor, but is that of the owner for the debtor's benefit. Creditors have no reason to complain of such preference or payment, for in the property transferred they have no manner of interest. *Winslow v. Clark*, 2 Lans. 377; s. c. 47 N. Y. 261.

A mortgage once paid can not be revived by a parol agreement, or continued for a demand other than the one it was given to secure, for the purpose of giving a preference thereby. The policy and object of the bankruptcy law are to seize and appropriate the property of the bankrupt for the benefit of his creditors. The debts are made a lien upon it, and it is disposed of for the purpose of satisfying them. To permit a bankrupt, after he knows that he is insolvent, to revive satisfied liens, in order to pay a part of his creditors, would be as fatal to the rights of his other creditors—as palpable a violation of the objects, as well as of the letter of the act—as if he were permitted to create new liens for the same purpose. The bankruptcy law itself, as well as the general principles alluded to, prohibit any such revival. *Ibid.*

The acts, knowledge, and intentions of the agent are, in law, the acts, knowledge, and intentions of his principal. *Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520; *Beattle v. Gardner*, 4 B. R. 323; s. c. 4 Ben. 479.

The burden of proof is on the assignee. *Parsons v. Topliff*, 14 B. R. 547; s. c. 119 Mass. 245.

A witness may testify as to what the defendant stated to be the contents of a letter without notice to produce the letter. *Paige v. Loring*, 1 Holmes, 275.

If payment is made in the ordinary course of dealing between the parties, the circumstance tends to show that some other motive actuated the debtor, rather than an intent to prefer. *Ashby v. Steere*, 2 W. & M. 347.

If the debtor goes to a particular creditor, hunts him up, picks him out from the rest, and pays him more in proportion than he can pay others, or if he elects to pay a relative to whom he is indebted, or if the transfer or conveyance is done secretly, or if it is out of the usual course of business, in a new, extraordinary, or unusual manner, or if payment of a debt is made before it becomes due, the circumstance tends to show an intent to prefer. *Ashby v. Steere*, 2 W. & M. 347; *Atkinson v. Farmers' Bank, Crabbe*, 529.

Testimony of the parties as to their intention is inexpressibly weak, and can rarely avail against the stronger proof which the transaction itself affords. *Oxford Iron Co. v. Slafter*, 14 B. R. 380; s. c. 13 Blatch. 455.

If the bankrupt delivered goods to the workmen of a creditor upon the credit of the creditor, with the expectation that they would be paid for at the next pay day, there is no preference, although the creditor subsequently applies the amount to a pre-existing debt. *Rice v. Grafton*, 13 B. R. 209; s. c. 117 Mass. 228.

Evidence of other transfers about the same time may be considered in determining whether there was an intent to prefer. *Atkinson v. Farmers' Bank, Crabbe*, 529.

An entry in the books of a party, or the absence of it, may be evidence against him of more or less weight, owing to the circumstances, but is not conclusive. In re *Comstock & Co.*, 12 B. R. 110; s. c. 3 Saw. 320.

Legal advice given to the debtor that he would be liable to a criminal prosecution unless he paid the debt will not make the payment valid. *Strain v. Gourdin*, 11 B. R. 156; s. c. 2 Woods, 380.

A transfer of firm property with the intent to prefer an individual creditor may be set aside. *Ancker v. Levy*, 3 Strobbh. Eq. 197.

If a transfer of firm property to one partner is made with the intent to give a preference to his individual creditors, it is void. *Collins v. Hood*, 4 McLean, 186.

If mortgaged property is sold, with the permission and consent of the mortgagee, and another mortgage is subsequently taken to secure the same debt, it is a new security, and not a mere substitution of securities. *Forbes v. Howe*, 102 Mass. 427.

The word "conveyance" in the bankruptcy act is a generic term, including all proceedings to dispose of or incumber property in derogation of the equality of creditors, with intent by such disposition to give a preference, or to defeat or delay the operation of the act. It includes mortgages. *Bingham v. Frost*, 6 B. R. 130.

The assignee may maintain a bill to have a mortgage declared void as a preference, although the bankrupt conveyed away the equity of redemption prior to the commencement of proceedings in bankruptcy. *Burpee v. Nat'l. Bank*, 9 B. R. 314; s. c. 5 Biss. 405.

The right to recover property transferred by the insolvent, which is given by this section, is in no sense a penalty imposed upon the party receiving it. The transfers and titles based thereon are thereby made void. Hence the right of recovery. *Cook v. Whipple*, 9 B. R. 155; s. c. 55 N. Y. 150; *Tinker v. Van Dyke*, 14 B. R. 112; s. c. 8 C. L. N. 235.

The declarations of the bankrupt in regard to a transfer made as a preference, are competent evidence against the preferred creditor, if the conspiracy to give the preference is established, although they were not made in the presence of, or brought to the knowledge of, the preferred creditor. *Nudd v. Burrows*, 13 B. R. 289; s. c. 91 U. S. 426.

The declarations of an alleged partner of the bankrupt are not admissible in favor of a preferred creditor. *Ibid.*

**Judgments.** The statute being within the express powers of Congress is supreme, and overrides all State legislation on the subject. If, therefore, a judgment is entered in contravention of the law, it is void. *Atkinson v. Purdy, Crabbe*, 551.

The amount received as a preference may be recovered, although it was received by virtue of a sale under an execution. *Clarion Bank v. Jones*, 11 B. R. 381; s. c. 21 Wall. 325; s. c. 2 A. L. T. (N. S.) 135.

If the property of the bankrupt has been sold under process from a State court issued on a judgment which is void as a preference, the creditor is liable to refund the money thus received to the assignee. *Shawhan v. Wherritt*, 7 How. 627.

There is nothing in this section which expressly or impliedly prohibits the taking or obtaining of a mere judgment against an insolvent debtor. The judgment alone only serves to establish the claim of the creditor and fix its amount, and if obtained without fraud or collusion with the debtor, is as conclusive evidence of those facts as if the debtor had been solvent. Where the authorities speak of a judgment as an illegal preference or an attempt to get one, it will be found in every instance that there was also a lien acquired upon the property of the debtor by means of the judgment, and that the illegal preference consisted in this lien, and not in the mere judgment itself. *Catlin v. Hoffman*, 9 B. R. 342; s. c. 2 Saw. 486.

Merely allowing a creditor to obtain a judgment by default in an action for a debt to which there is no defense, does not, as a conclusion of law, raise an implication of a motive or an intent to prefer. *Willson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473; in re Kerr, 2 B. R. 388; s. c. 2 L. T. B. 39; in re J. B. Wright, 2 B. R. 490; *Haughey v. Albin*, 2 B. R. 390; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47; in re Moulton et al., 4 Pac. L. R. 127; *Ballou v. Minard*, 2 Brews. 560; *Britton v. Payen*, 9 B. R. 445; s. c. 7 Ben. 219; *Partridge v. Dearborn*, 9 B. R. 474; *Clarke v. Plet*, 3 McLean, 494; in re Uriah Krum, 7 Ben. 5; *Platt v. Stewart*, 13 Blatch. 481. Contra, in re Black & Secor, 1 B. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39; in re McGie (ex parte Sanger), 2 B. R. 531; s. c. 2 Biss. 163; s. c. 2 L. T. B. 80; *Kohlsaat v. Hoguet*, 5 B. R. 159; s. c. 4 Ben. 565; in re C. A. Davidson, 3 B. R. 418; s. c. 4 Ben. 10; *Linkman v. Willcox*, 1 Dillon, 161; *Catlin v. Hoffman*, 9 B. R. 342; s. c. 2 Saw. 486.

Something more than the passive nonresistance of an insolvent debtor to regular judicial proceedings in which a judgment and levy on his property are obtained, when the debt is due and he is without just defense to the action, is necessary to show a preference of a creditor or a purpose to defeat or delay the operation of the bankruptcy law. *Willson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473.

Very slight evidence of an affirmative character of the existence of a desire to prefer one creditor, or of acts done with a view to secure such preference, may be sufficient to invalidate the whole transaction. Such evidence may be sufficient to leave the matter to a jury or to support a decree, because the known existence of a motive to prefer or to defraud the bankruptcy act will color acts or decisions otherwise of no significance. The cases must rest on their own circumstances. *Willson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473; *Buchanan*

v. Smith, 4 B. R. 397; s. c. 7 B. R. 513; s. c. 8 Blatch. 153; s. c. 16 Wall. 277; *Traders' Nat'l. Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87; *Beattie v. Gardner*, 4 B. R. 323; s. c. 4 Ben. 479; *Wilson v. Brinkman*, 2 B. R. 468; s. c. 1 C. L. N. 193; *Ford v. Keyes*, 15 I. R. R. 59; in re *Dunkle & Driesbach*, 7 B. R. 72; *Shaffer v. Fritchery*, 4 B. R. 548; *Vogle v. Lathrop*, 4 B. R. 439; s. c. 4 Brews. 253; in re *Jerome E. Baker*, 14 B. R. 433.

If the debtor does anything before suit which will secure the creditor a judgment with priority of lien, with intent to do so, this will render the preference void. *Little v. Alexander*, 12 B. R. 134; s. c. 21 Wall. 500.

If a person who knows that he is insolvent, substitutes small notes for a large note, whereby the creditor is enabled to recover summary judgments, the executions thereon may be set aside. *Loudon v. First Nat'l. Bank*, 15 B. R. 476.

Though a judgment creditor, who has obtained a judgment by default through the mere passive nonresistance of the debtor, may know the insolvent condition of the debtor, his levy and seizure under such circumstances are not void nor any violation of the bankruptcy law. *Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473.

There is no distinction in this respect between involuntary and voluntary bankruptcy. *Haskell v. Ingalls*, 5 B. R. 205; in re *C. A. Davidson*, 3 B. R. 418; s. c. 4 Ben. 10.

If a judgment is confessed at a time when the debtor is solvent, an execution may be subsequently issued when the debtor is insolvent. *Field v. Baker*, 11 B. R. 415; s. c. 12 Blatch. 436.

If a confession of judgment by an insolvent debtor is actually followed by an execution and seizure of his property, it is an unlawful preference if made with a view to prefer. *Webb v. Sachs*, 15 B. R. 168; s. c. 13 Pac. L. R. 28; s. c. 9 C. L. N. 156.

Where the preference is obtained by a judgment and execution, there must be guilty collusion to constitute the fraudulent preference condemned by the statute. *Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 21 Wall. 360; s. c. 10 Blatch. 204.

The slightest solicitation on the part of the creditor will protect the judgment. Unless it clearly appears that the act originated with the debtor, and that he took the first step to have the judgment rendered, it is valid. *Haldeman v. Michael*, 6 W. & S. 128; *Wilkinson's Appeal*, 4 Penn. 284.

A security or priority gained by a suit in a State court has no better claim to protection than a payment by the debtor himself. *Shawhan v. Wherritt*, 7 How. 627.

A creditor may reduce his claim to a sum within the jurisdiction of a magistrate, take a judgment by default thereon, and obtain priority by issuing an execution for the same. *Witt v. Hereth*, 13 B. R. 106; s. c. 6 Biss. 474.

The mere filing of an affidavit and issue of an execution on the day of the commencement of the proceedings in bankruptcy, do not establish collusion between the creditor and the bankrupt. *Ibid.*

A party who claims that a levy was void under the bankruptcy law must allege the facts necessary to make the levy invalid. *O'Hara v. Stone*, 48 Ind. 417.

In an action at law, actual collusion in obtaining a judgment is always a question for the jury. *Louchelm v. Henzey*, 77 Penn. 305.

A preference may be set aside, although it is obtained by virtue of a warrant to confess judgment. *Clarion Bank v. Jones*, 11 B. R. 381; s. c. 21 Wall. 325; s. c. 2 A. L. T. (N. S.) 135.

The mere entry of a judgment by virtue of a warrant of attorney given when the debtor was solvent, is not such a preference as the statute avoids, although it is entered just before the commencement of the proceedings in bankruptcy, and when the creditor knows that the debtor is insolvent, and though it is followed by an execution. *Clark v. Isell*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 21 Wall. 360; s. c. 10 Blatch. 204; *Buckingham v. McLean*, 13 How. 151; s. c. 3 McLean, 185; *Piper v. Brady*, 10 B. R. 517; s. c. 31 Leg. Int. 316; *Sleek v. Turner*, 10 B. R. 580; 76 Penn. 142; s. c. 1 A. L. T. (N. S.) 485; in re *J. B. Wright*, 2 B. R. 490; *Armstrong v. Rickey & Brothers*, 2 B. R. 473; s. c. 1 C. L. N. 145; *Love v. Love*, 21 Pitts. L. J. 101; *Watson v. Taylor*, 21 Wall. 378. Contra, *Golson v. Neihoff*, 5 B. R. 56; s. c. 2 Biss. 434; *Hood v. Karper*, 5 B. R. 358; s. c. 8 Phila. 160; s. c. 2 L. T. B. 201; in re *F. C. Lord*, 5 B. R. 318; in re *Terry & Cleaver*, 4 B. R. 126; s. c. 2 Biss. 356; *Vogel v. Lathrop*, 4 B. R. 439; s. c. 4 Brews. 253; *Zahm v. Fry*, 9 B. R. 546; s. c. 31 Leg. Int. 197; s. c. 21 Pitts. L. J. 155.

The execution under the warrant of attorney will be valid, although the creditor's son was the bankrupt's bookkeeper, and gave his father balance sheets from time to time, showing the bankrupt's condition. *McCormick v. Buckner*, 2 W. N. 480.

If the bankrupt was insolvent at the time of the giving of the warrant of attorney and the creditor knew it, the preference obtained by a subsequent execution may be set aside, although the proceedings in bankruptcy are instituted against him more than two months after the giving of the warrant of attorney. In re *August Herpich*, 15 B. R. 426; s. c. 9 C. L. N. 253.

This section defines acts that may render other persons liable to actions at the suit of the assignee for the recovery of assets. Section 5021 only defines the acts of a debtor for which he may be involuntarily adjudged a bankrupt. The latter section makes the mere giving, under certain circumstances, of a warrant to confess judgment an act of involuntary bankruptcy. This applies to the debtor only. This section, which affects other persons, does not mention the warrant at all. Thus, the creditor who has the warrant of attorney is never affected injuriously by merely having received it. The reason for the difference is obvious. The subsequent use of the warrant of attorney can alone give rise to any question so far as the creditor is concerned. *Hood v. Karper*, 5 B. R. 358; s. c. 8 Phila. 160; s. c. 2 L. T. B. 201.

If a judgment, taken merely as an auxiliary security, and embodying the amount of other judgments, is void as a preference, it will not infect

and vitiate them, because this section abrogates only the instrumentality by which a preference is sought to be obtained, and all interests or advantage acquired by its use, and the creditor may himself annul the void judgment by a release on the record and hold the valid judgment. *Vogle v. Lathrop*, 4 B. R. 439; s. c. 4 Brews. 253.

The lien of a judgment upon real property binds it for the payment of the claim for which the judgment was given as effectually as a mortgage made by the debtor for that purpose. Indirectly, it works, causes or makes a transfer of the property upon which it operates from the judgment debtor to the judgment creditor. *Catlin v. Hoffman*, 9 B. R. 342; s. c. 2 Saw. 486.

If a creditor sues to recover a debt before it is due, the lien acquired by his judgment will be set aside as fraudulently obtained through the use of improper means. *Partridge v. Dearborn*, 9 B. R. 474.

An agreement discontinuing several suits in a State court, and transferring the claim for litigation in another suit pending between the same parties, for the purpose of enabling a creditor to shelter and protect any sum that he may recover by the attachment issued in the latter suit, is void. A debtor and a creditor can not be allowed, on the very eve of bankruptcy, to enter into any arrangement by which they can control the course of future litigation in the State court in suits there pending to which the debtor is a party. The assignee has the right to be substituted as a party in the place of the bankrupt, and he may and should exercise that right. It is the duty of the district court to grant an effectual relief against the use of such agreement, and secure to the assignee the free and untrammelled exercise of all the rights which the bankruptcy act confers upon him with reference to such litigation, whether in the prosecution or defense of such suits. *Samson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325.

The mere fact that the property taken on an execution has been turned into money, does not prevent it from still remaining the debtor's property under the bankruptcy act. *Mills v. Davis*, 10 B. R. 340; s. c. 35 N. Y. Supr. 355.

Evidence that the entry of a judgment under a warrant to confess judgment was a surprise on the bankrupt, is immaterial and inadmissible. *Clarion Bank v. Jones*, 11 B. R. 381; s. c. 21 Wall. 325; s. c. 2 A. L. T. (N. S.) 135.

When property of the bankrupt has been sold under judgment confessed, with a view to give fraudulent preferences, the assignee may apply in the State court for permission to come in at any time before a final decree, and claim the fund against the creditors, and have a trial of the facts. It is unnecessary that the judgment should be opened. The act of Congress operates directly upon the rights of the creditors, and makes their preferences void. The assignee claims, not upon an adverse title, but under and through the bankrupt by virtue of the bankruptcy act. His claim is adverse to the creditors only in the sense that they are postponed, and he supersedes them, and comes in upon the fund, and not the property, on account of the rightful jurisdiction of the State court,

at the time to seize and sell the property. *Rohrer's Appeal*, 62 Penn. 498; *Jordan v. Downey*, 12 B. R. 427; s. c. 40 Md. 401; *Chan v. Chan*, 1 Penn. L. J. 175.

**Reasonable Cause.**—The bankruptcy act does not require that the party receiving the transfer shall know, etc., but that he shall have reasonable cause to believe—such reasonable cause as would induce the belief in the mind of an intelligent, capable business man. *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520; *Sedgwick v. Sheffield*, 6 Ben. 21; *Otis v. Hadley*, 112 Mass. 100.

It is sufficient if the creditor had reasonable cause to believe the debtor to be in contemplation of insolvency, although he did not have reasonable cause to believe him to be insolvent in fact. *Paige v. Loring*, 1 Holmes, 275.

It is not necessary that the creditor shall know or be aware of the debtor's intent to give a preference. *Webb v. Sachs*, 15 B. R. 168; s. c. 13 Pac. L. R. 28; s. c. 9 C. L. N. 156.

It should be averred that the creditor, at the time of the transfer, had reasonable cause to believe, etc. *In re Hunt*, 2 B. R. 539; s. c. 1 C. L. N. 169.

"Reasonable cause to believe," means a state of facts or circumstances which would lead any prudent man to make inquiries. It will not do to ask protection on account of ignorance, when a small amount of inquiry would have given all necessary information. *In re J. B. Wright*, 2 B. R. 490; *in re Arnold*, 2 B. R. 160; *White v. Raftery*, 3 B. R. 221; s. c. 1 C. L. N. 361; s. c. 16 Pitts. L. J. 110; *Merchants' National Bank v. Truax*, 1 B. R. 545; s. c. 1 L. T. B. 73.

The statute does not require that the creditor shall have absolute knowledge on the point, nor even that he shall, in fact, have any belief on the subject. It only requires that he shall have reasonable cause to believe, and he must be considered to have reasonable cause to believe when such a state of facts is brought to his notice, in respect to the affairs and pecuniary condition of the debtor, as would lead prudent business men to the conclusion that the debtor can not meet his obligations as they mature in the ordinary course of business. *Toof v. Martin*, 6 B. R. 49; s. c. 4 B. R. 488; s. c. 1 Dillon, 203; s. c. 13 Wall. 40; *Buchanan v. Smith*, 4 B. R. 397; s. c. 7 B. R. 513; s. c. 8 Blatch. 153; s. c. 16 Wall. 277; *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584; *in re Clark & Daughtrey*, 10 B. R. 21; *Burpee v. National Bank*, 9 B. R. 314; s. c. 5 Biss. 405; *Platt v. Stewart*, 13 Blatch. 481.

Actual belief is not made the criterion of proof, nor is it necessary that it should appear that the creditor actually believed that the debtor was insolvent; but the true inquiry is, whether the creditor, as a business man acting with ordinary prudence, sagacity, and discretion, had reasonable cause to believe that the debtor was insolvent, in view of all the facts and circumstances known to him at the time he received the transfer of the property. If it appears that the debtor was actually insolvent, and that the means of knowledge upon the subject were at hand, and that

such facts and circumstances were known to the creditor as clearly put him on inquiry, he had reasonable cause to believe that the debtor was insolvent. Ordinary prudence is required of a purchaser in respect to the title of the seller, and if he fails to investigate, when put upon inquiry, he is chargeable with all the knowledge which it is reasonable to suppose he would have acquired if he had performed his duty. Constructive notice is sufficient, upon the ground that when a party is about to perform an act by which he has reason to believe that the rights of a third person may be affected, an inquiry as to the facts is a moral duty, and diligence an act of justice. Whatever fairly puts a party upon inquiry is sufficient notice where the means of knowledge are at hand, and if the party, under such circumstances, omits to inquire, and proceeds to receive the transfer or conveyance, he does so at his peril, as he is chargeable with a knowledge of all the facts which, by a proper inquiry, he might have ascertained. *Scammon v. Cole*, 5 B. R. 257; s. c. 3 B. R. 393; s. c. 2 L. T. B. 103; *Buchanan v. Smith*, 4 B. R. 397; s. c. 7 B. R. 513; s. c. 8 Blatch. 153; s. c. 16 Wall. 277.

Knowledge of a trader's inability to pay his debts in the ordinary course of business, derived from his failure to pay the debt due to the preferred creditor himself, is at least sufficient to put a party upon the inquiry as to the debtor's solvency. *In re Forsyth & Murtha*, 7 B. R. 174.

Willing ignorance, as where a party willfully shuts his eyes to the means of information which he knows are at hand, is regarded as equivalent to actual knowledge. *Scammon v. Cole*, 5 B. R. 257; *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584; *Peckham v. Burrows*, 3 Story, 544.

If other creditors institute inquiries, shortly after the making of the transfer, and find no difficulty in learning that the debtor owes more than the value of his property, this shows that the means of ascertaining his condition were at hand. *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 534.

The proposition of "reasonable cause to believe," is one of fact, to be established by proof, and found by the jury. The intent to prefer may be inferred from the fact of preference, and it is competent for the jury that this intent is so plainly inferable, from the acts of the debtor known to the creditor, as to amount to reasonable cause to believe. *Forbes v. Howe*, 102 Mass. 427.

The actual belief of the creditor as to the solvency of the debtor is wholly immaterial. The only inquiry which, under the statute, is relevant to the issue is, whether the creditor had reasonable cause to believe the debtor insolvent; that is, whether, in view of all the facts and circumstances which were known to the creditor, concerning the business and pecuniary condition of the debtor, in connection with the time and mode of the transfer of the property taken, he, as a reasonable man, acting with ordinary prudence, sagacity and discretion, had good ground to believe that the debtor was insolvent. This is the only legitimate subject of inquiry. It was not intended by the statute to make the actual



belief of the party concerning the solvency of the debtor one of the standards by which to test the validity of the transfer of property to him. Such a belief might, or might not, be well founded. It would be an uncertain and fluctuating standard. That which would satisfy one man, would be wholly insufficient to convince another; and those facts which would fall far short of producing belief in a person who was disinterested and impartial might have a different effect upon the same person when acting under a strong influence of self-interest. In the place of a test so uncertain and unsatisfactory as the belief of a party, formed under a great bias, the statute has established one much more safe and definite, applicable to all persons alike, and easily understood and readily applied — the belief of a reasonable man taking a transfer of property under like circumstances. *Scammon v. Cole et al.*, 3 B. R. 393; s. c. 2 L. T. B. 103.

Instructions which confine the plaintiff to proof of reasonable cause of belief as to the debtor's actual financial condition, instead of permitting him to prove reasonable cause of belief on the defendant's part as to the debtor's purposes and ultimate intentions are erroneous. It is undoubtedly true, that the distinction here pointed out is usually of not much practical importance. The question usually submitted to the jury, as the turning point in the trial, is, as to the preferred creditor's reasonable cause to believe the debtor to be insolvent in fact at the time of making the payment, or giving the security complained of, as constituting an unlawful preference. But when the evidence has a tendency to show that there were apparent indications that insolvency was a probable and approaching event, it is material to instruct the jury that the plaintiff is entitled to recover, if his proof as to the defendant's reasonable cause of belief goes no further than cause to believe that the debtor, at the time, was acting in contemplation of insolvency. *Beals v. Quinn*, 101 Mass. 262.

Evidence tending to prove that the creditor had reasonable cause to believe the debtor to be insolvent is not competent unless it is brought home to his personal knowledge before or at the time of his purchase. *Crump v. Chapman*, 15 B. R. 571.

Where the defendant admits that a statement made by the bankrupt on examination in his presence is true, the statement may be proved by any one who heard it. *Goodrich v. Wilson*, 14 B. R. 555; s. c. 119 Mass. 429.

Evidence of the debtor's financial condition and reputation a year previous to the giving of the security is competent upon the question of his solvency or insolvency a year later, and as tending to show what means the creditor had to know, or cause to believe, that the debtor was insolvent. *Forbes v. Howe*, 102 Mass. 427.

Evidence that it was a general custom and within the ordinary course of business for persons engaged in the same business to make sales like the one in controversy, and that this custom was well known to the trade, is competent. *Otis v. Hadley*, 112 Mass. 100.

Evidence that such a sale would not be a suspicious circumstance that would affect the bankrupt's reputation for solvency is inadmissible. *Ibid.*

The defendant can not prove that he has made similar purchases from others in the same trade. *Ibid.*

Evidence as to the creditor's actual belief is inadmissible, for, if he had reasonable cause to believe, it is immaterial whether he did in fact believe or not. *Forbes v. Howe*, 102 Mass. 427.

The declarations or acts of the debtor subsequent to the transfer are not admissible as against the creditor. *Phoenix v. Ingraham*, 5 Johns. 412.

The creditor is not of necessity affected by a misrepresentation or deceit of the bankrupt in regard to the transaction. *Brooke v. Scoggins*, 11 B. R. 258; s. c. 9 Pac. L. R. 12.

Any serious and intentional misstatement, or attempt to mislead or deceive other creditors in regard to the transaction, when made by the creditor casts suspicion on the transaction. *Ibid.*

The validity of a preference does not depend on the moral good faith with which it was accepted by the creditor. *Alderdice v. State Bank*, 11 B. R. 398.

The creditor's belief that he is entitled to the preference is not material. The intent to receive a preference should not be confounded with corrupt motive. *Bingham v. Richmond*, 6 B. R. 127.

The bankruptcy act disarms the vigilance of creditors generally, by declaring that no vigilance can be rewarded by a preference, if obtained contrary to its provisions within four months prior to the filing of the petition in bankruptcy. It undertakes to disable creditors from procuring preferences within that period by attachment, mortgage, or confession of judgment. It must be so administered as to suppress illegal preferences, or it necessarily operates as a fraud upon the rights of the mass of creditors who in good faith refrain from seeking advantages contrary to its provisions and policy. *Markson v. Hobson*, 2 Dillon, 327.

All experience shows that positive proof of fraudulent acts between debtor and creditor is not generally to be expected, and it is for this reason, among others, that the law allows in such controversies a resort to circumstances as the means of ascertaining the truth, and the rule of evidence is well settled that circumstances altogether inconclusive, if separately considered, may by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584.

If a merchant debtor in a mercantile community is so straitened that, without pretense of any defense, he is under the pressure of suits to compel payment of debts maturing in his current business, this is very high evidence of his inability to pay. *Mayer v. Hermann*, 10 Blatch. 256.

The existence of a financial crisis constitutes of itself a reasonable cause for believing doubtful men to be insolvent. *In re Clark & Daughtrey*, 10 B. R. 21.

A creditor may be affected by rumors which he has heard about the debtor's embarrassment. *Post v. Corbin*, 5 B. R. 11; *Golson v. Neihoff*, 5 B. R. 56; s. c. 2 Biss. 434; *Hyde v. Corrigan*, 9 B. R. 466; s. c. 7 Pac. L. R. 121.

A payment received in the ordinary course of business, without any reasonable cause to believe the debtor to be insolvent, is valid. *Coxe v. Hale*, 8 B. R. 562; s. c. 10 Blatch. 56; *Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 21 Wall. 360; s. c. 10 Blatch. 204.

A conveyance out of the ordinary course of business is sufficient evidence, if uncontrolled, to establish a knowledge of the debtor's insolvency. The purchaser is put upon the inquiry, and should take steps to ascertain the condition of the debtor, or at least his general reputation as to solvency. *Tuttle v. Truax*, 1 B. R. 601; in re *Palmer*, 3 B. R. 283; s. c. 1 L. T. B. 139; in re *E. Meyer*, 2 B. R. 422; s. c. 1 C. L. N. 210; in re *Colman*, 2 B. R. 563; in re *Dean & Garrett*, 2 B. R. 89; in re *Hafer & Bro.* (in re *Beck*), 1 B. R. 586; s. c. 6 Phila. 474; *Scammon v. Cole*, 5 B. R. 257; *North v. House*, 6 B. R. 365.

Independent of the express provisions of the bankruptcy act, the general rule of law is, that the transfer or delivery of property will be considered fraudulent when it is not delivered in the usual course of trade, or of the accustomed dealings between the parties. *Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186.

A creditor who has before him what the bankruptcy act declares shall be *prima facie* evidence of fraud, must, in law, be deemed to have reasonable cause to believe in the existence of such fraud, unless this legal presumption is overborne by opposing evidence. In re *Kingsbury et al.*, 3 B. R. 318; *Wilson v. Stoddard*, 4 B. R. 254; s. c. 2 C. L. N. 161.

This *prima facie* evidence is present to every creditor who accepts a security in any case to which the provision is applicable; and unless the creditor has evidence sufficient to repel this legal presumption, he has reasonable cause to believe that the security is fraudulent and void under the bankruptcy act. This will necessarily prevent any security voluntarily given by an insolvent to a favored creditor from being held valid, simply because it proceeded from the voluntary act of the debtor, and was prepared without any previous communication with the creditor, either in regard to the giving of the security, or the financial condition of the debtor. A creditor can not, by shutting his eyes when this statutory *prima facie* evidence of fraud is placed before him, escape the consequences of this provision. When he accepts a security, he is conclusively presumed to know what appears upon its face, and to have reasonable cause to believe it was intended to accomplish what must be its ordinary and necessary effect; and no masterly inactivity, no self-imposed ignorance of what the circumstances call upon him to ascertain, however intense, and however closely guarded that ignorance may be, can make fraudulent preferences valid and binding as against the assignee. *Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520.

Transfers made in the usual and ordinary course of a trader's business, or payments made at the time a debt matures, and in the usual mode of paying debts, are *prima facie* valid. On the other hand, whenever a creditor is in possession of such facts and circumstances in reference to his debtor's standing, as arouse suspicion with regard to his solvency or ability to meet his indebtedness, the creditor is so far put upon inquiry that he will not be allowed to shut his eyes to those facts and circumstances, and

obtain payment of a debt otherwise than as it matures, or take security or a transfer of property from the debtor to the prejudice of other creditors. Not paying debts in the usual and ordinary course of a trader's business, from a lack of present means, and want of ability to raise means, must be regarded as *prima facie* evidence of insolvency, and the creditor who has knowledge of such facts must act in view of them. *Driggs v. Moore, Foot & Co.*, 3 B. R. 602; s. c. 1 Abb. C. C. 440.

It is a sound rule that, when a person suspects the solvency of a debtor, and, in consequence of that suspicion, obtains property or money, and thereby a preference, and it turns out in fact that his debtor is insolvent, he may be said to be in the predicament contemplated by the bankruptcy law; he has reasonable ground to believe that his debtor is insolvent, and so can not avail himself of the payment made, or security obtained. Courts ought not to prevent or interfere with the ordinary business operations between man and man, and do not attempt to do so unless there is something in the transaction indicating that the man who makes it has reason to believe that he is getting what ought to belong to creditors generally, and if so, the bankruptcy law declares he can not avail himself of money or property thus obtained. But, when a man acts without knowledge of the condition of the party, or of anything to create suspicion of his solvency, and in good faith obtains a payment or security, then the bankruptcy law will not interfere with it. *Traders' National Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87.

Although the consideration for an assignment of a claim to a third person is paid out of the funds of the debtor by such third person, yet the assignee is not entitled to recover unless it appears that the creditor at the time clearly understood that he was dealing directly with the debtor's agent for a conveyance, security, transfer or payment from or out of the funds of the debtor. The creditor is entitled to retain the money if he was misled by such third person into the belief that the transaction was a mere assignment of the debt to himself for his own benefit, and to be paid for out of his own funds. *Winsor v. Kendall*, 6 Story, 507.

Mere knowledge that a claim of less than \$100 remains unsettled does not constitute reasonable cause to believe that a fraud on the act is being committed by accepting a payment. *Castle v. Lee*, 11 B. R. 80.

The small amount of means used to carry on the business can not affect the validity of the transfer, for the statute can not be graded by any system of minimums in its application to the various trades, professions and callings of individuals. *McAllister v. Richards*, 6 Penn. 133.

No creditor, after exacting a deed of trust so stringent as to destroy the credit of an insolvent debtor, has a right to claim that he did not have reasonable cause to believe the debtor to be insolvent. *In re Clark & Daughtrey*, 10 B. R. 21.

The taking of a debtor's property on legal process is not in the ordinary course of his business. When a creditor makes repeated demand for payment, and is compelled to resort to legal process to obtain satisfaction, he has reasonable cause to believe the debtor to be insolvent. *Haskell v. Ingalls*, 5 B. R. 205.

The confession of a judgment can not be considered as an act done in the ordinary course of the debtor's business. It is, therefore, *prima facie* contrary to the provisions of the act, both as to the debtor and the creditor receiving it. The burden of proof is upon the creditor to overcome this presumption. *In re Walton et al.*, 1 Deady, 442.

When an execution must necessarily stop the debtor's business, the execution creditor, in general, has reasonable cause to believe the debtor to be insolvent. *Hood v. Karper*, 5 B. R. 358; s. c. 8 Phila. 160; s. c. 2 L. T. B. 201; *Zahm v. Fry*, 9 B. R. 546; s. c. 21 Pitts. L. J. 155; s. c. 31 Leg. Int. 197.

Creditors issuing executions on judgments obtained on demands long overdue, against a bankrupt who has been pressed in repeated instances to pay or secure the demands, and has failed to do so because of his inability, must be held to have had reasonable cause to believe that the debtor was insolvent. *Buchanan v. Smith*, 4 B. R. 397; s. c. 7 B. R. 513; s. c. 8 Blatch. 153; s. c. 16 Wall. 277.

Payments by a banker, whose doors are closed, in checks upon another bank in the same place, are not in the ordinary course of his business. *Markson v. Hobson*, 2 Dillon, 327.

If the bank is not the general banker of a bankrupt, the case is not one for the application of the cautionary rule which requires transactions between them to be scrutinized with care. *Rankin v. Third Nat'l Bank*, 14 B. R. 4.

The debtor's remonstrances, that the giving of the security will injure his credit, is sufficient to put the creditor upon inquiry. *Wager v. Hall*, 5 B. R. 181; s. c. 3 Biss. 28; s. c. 16 Wall. 584; *Hyde v. Corrigan*, 9 B. R. 466; s. c. 7 Pac. L. R. 121.

If a transfer was not in the usual and ordinary course of business of the bankrupt, that fact is *prima facie* evidence that a fraud was committed upon the bankruptcy act by the transfer, and the burden of proof will be upon the creditor receiving it to show the validity of the transaction as respects a fraud on the act. But if the transfer was made in the usual and ordinary course of business of the bankrupt, then the burden of proof will rest upon the assignee. *Collins et al. v. Bell et al.*, 3 B. R. 587; *Scammon v. Cole et al.*, 3 B. R. 393; s. c. 2 L. T. B. 103.

A transfer of the whole of the debtor's property is not in the usual and ordinary course of business. A conveyance of part may be public, fair and honest, but a conveyance of all must either be fraudulently kept secret or produce an immediate absolute bankruptcy. Nothing remains for the creditors in any shape. The debtor is, therefore, insolvent, of course, the moment he executes the deed, for there is nothing at all left for his creditors. *Grow v. Ballard*, 2 B. R. 254; s. c. 1 L. T. B. 111; *Brock v. Terrell*, 2 B. R. 643; *Davis & Green v. Armstrong*, 3 B. R. 34; s. c. 2 L. T. B. 138; *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *In re Batchelder*, 3 B. R. 150; s. c. Lowell, 373; *Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520; *Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186; *Cookingham v. Morgan*, 5 B. R. 16; s. c. 7 Blatch. 480; *Walbrun v. Babbitt*, 6 B. R. 539; s. c. 9 B. R. 1; s. c. 16 Wall. 577; *Peckham v. Burrows*, 3 Story, 544.

A conveyance of all the debtor's property to a creditor who has no knowledge that there are any other creditors is valid. *Wadsworth v. Tyler*, 2 B. R. 316; s. c. 2 L. T. B. 28.

The transfer will stand if nothing was brought to the attention of the creditor which would reasonably have induced him to believe the debtor to be insolvent. *Rankin v. Third Nat'l. Bank*, 14 B. R. 4.

The transfer of all the goods of a debtor and the lease of the store-house in which they are kept, and putting others in possession with authority to sell all his stock and apply the proceeds to the payment of debts in execution, is not in the usual course of business; does break up his business; and is not only some, but very strong evidence of an intent to prefer his creditors, he being at the time insolvent. What is the usual course of a retail merchant's business? It is to sell his goods at his usual place of business to customers as they come, to keep up an ordinary stock, and continue in business in the usual way that such merchants do. Certainly it is not in the usual course of a retail merchant's business when in a state of actual insolvency, to confess judgment to certain creditors, suffer executions to be levied by them, and then assign over to them all his stock, and his place of business, put them in possession, and provide that the surplus over the payment of their claims shall be returned to himself. Such a state of facts undoubtedly justifies the court in saying that it is required to be rebutted by some evidence that the transaction was not intended as an undue preference contrary to the provisions of the bankruptcy law. *Pierce v. Evans*, 61 Penn. 415; *Mayer v. Hermann*, 10 Blatch. 256.

When a party is aware that all demands for which he could be held liable, as well for the individual members as for the firm itself, and whether the same had matured or not, were to be paid, whilst other demands known to him are left unsecured, and that by the arrangement debts not due are anticipated, and thereby the discount which has been paid is lost, he has reasonable cause to believe that a preference is intended. Knowledge of overdue debts, and the fact that a large amount of firm property is applied to the discharge of the personal liabilities of the partners, and not to the firm debts, are circumstances that call for plenary proof that the transfer was not designed as a preference. *Scammon v. Cole et al.*, 3 B. R. 393; s. c. 5 B. R. 257; s. c. 2 L. T. B. 103.

A transfer of all the debtor's property subject to execution, leaving other creditors to obtain payment out of the debts due to him, constitutes a reasonable cause to believe him to be insolvent. *Smith v. McLean*, 10 B. R. 260.

The rule that insolvency consists in present inability to pay debts might apply if the debtor be present and the negotiations are with him. But when he is absent, and that absence is alleged as the sole reason for the nonpayment of the debt, and the reasons given for such absence are not such as would excite any suspicion of insolvency or present inability to pay, it has no application. Clerks and agents are not supposed to have entire control of the resources of their principal to such an extent as to make their failure to meet an obligation of their principal an act of

bankruptcy against him. Security given by an agent after demand and nonpayment of a debt under such circumstances will be valid. *Jenkins v. Meyer*, 3 B. R. 776; s. c. 2 Biss. 303.

When a merchant fails to pay his notes or rather mercantile obligations as they become payable, the immediate presumption of inability to pay arises. There may be reasons in a particular case why payment at maturity is not made. There may be a defense to the apparent debt; the nonpayment may be caused by accident or carelessness or inattention, or it may be the result of some other special temporary cause entirely consistent with amplest solvency. Nevertheless, where no such cause exists, nonpayment *prima facie* imports inability to pay in due course of business. *Mayer v. Hermann*, 10 Blatch. 256; *Dunning v. Perkins*, 2 Biss. 421; *Bartholow v. Bean*, 10 B. R. 241; s. c. 18 Wall. 635; *Shaffer v. Fritchery*, 4 B. R. 548; *Golson v. Nelhoff*, 5 B. R. 56; s. c. 2 Biss. 434; *Wilson v. City Bank*, 5 B. R. 270; s. c. 9 B. R. 97; s. c. 1 Dillon, 476; s. c. 17 Wall. 473; *Warren v. Del., L. & West. R. Co.*, 7 B. R. 451; s. c. 10 Blatch. 493; *Warren v. Tenth Nat'l. Bank*, 7 B. R. 481; s. c. 10 Blatch. 493; *Harrison v. McLaren*, 10 B. R. 244.

Notice of the nonpayment of a judgment note is not notice of the insolvent condition of the maker. *Love v. Love*, 21 Pitts. L. J. 101; *Piper v. Brady*, 10 B. R. 517; s. c. 31 Leg. Int. 316.

The nonpayment of an account for goods sold when there is no circumstance warranting any other inference than that the debtor can not pay for the want of means, indicates insolvency, and affords a reasonable cause to believe him to be insolvent. *Mayer v. Hermann*, 10 Blatch. 256.

The existence of the required reasonable cause for belief may be inferred from all the circumstances of the transaction. *In re Gregg*, 4 B. R. 456; *Stranahan v. Gregory & Co.*, 4 B. R. 427; *Anon.*, 1 Pac. L. R. 173; *Buchanan v. Smith*, 4 B. R. 397; s. c. 7 B. R. 513; s. c. 8 Blatch. 153; s. c. 16 Wall. 277; *Alderdice v. State Bank*, 11 B. R. 398; *Brooke v. Scoggins*, 11 B. R. 258; s. c. 9 Pac. L. R. 12.

The making of subsequent advances does not negative the existence of a reasonable cause to believe the debtor to be insolvent, when it was for the interest of the creditor to make such advances. *Harrison v. McLaren*, 10 B. R. 244.

To confess knowledge of the facts which constitute insolvency, and at the same time deny knowledge of the bankrupt's insolvency, is simply a denial of law rather than of fact. *Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186; *Toof v. Martin*, 4 B. R. 488; s. c. 6 B. R. 49; s. c. 13 Wall. 40; s. c. 1 Dillon, 203; *Warren v. Del., L. & West. R. Co.*, 7 B. R. 451; s. c. 10 Blatch. 493.

Equity pays no regard to the forms resorted to by parties in fraud of the law. *Toof v. Martin*, 4 B. R. 488; s. c. 6 B. R. 49; s. c. 13 Wall. 40; s. c. 1 Dillon, 203.

The principal is chargeable with all the knowledge which his agent had at the time of the transaction. *In re E. Meyer*, 2 B. R. 422; s. c. 1 C. L. N. 210; *Ungewitter v. Von Sachs*, 3 B. R. 723; s. c. 4 Ben. 167; s. c. 1 L. T. B. 224; s. c. 3 L. T. B. 195; *Graham v. Stark*, 3 B. R. 357; s. c.

3 Ben. 520; *Vogle v. Lathrop*, 4 B. R. 439; s. c. 4 Brews. 253; *Markson v. Hobson*, 2 Dillon, 327; *Mayer v. Hermann*, 10 Blatch. 256. Contra, in re *J. B. Wright*, 2 B. R. 490.

Where a creditor places his claim in the hands of a collection agent to forward for collection, the creditor is not chargeable with the knowledge of a subagent employed by the latter if he does not receive the proceeds of a judgment by confession obtained by him, although the proceeds were remitted to the collection agent. *Hoover v. Wise*, 14 B. R. 264; s. c. 61 N. Y. 305; s. c. 91 U. S. 308.

Where the attorney of a creditor is prosecuting a debtor to enforce payment of a debt, and by reason thereof the debtor discloses to him that he is insolvent and asks his advice, and he assumes to give it, he can not by accepting such retainer evade the operation of the rule that the knowledge of the agent acquired in the conduct of his employer's business is knowledge of his principal. In every step of the prosecution of the claim to collection, he is the agent of the creditor, the performance of his duty to that creditor involves the gaining of knowledge of the debtor's insolvency, and no proffered confidence put in him by the adverse party can make that information less his client's property, or less information acquired in his agency, and imputable to such client. *Mayer v. Hermann*, 10 Blatch. 256.

A general authority, with subsequent tacit acquiescence, is sufficient proof that an agent had authority to accept a preference. In re *Colman*, 2 B. R. 563.

A corporation is chargeable with the knowledge of its officers. *Loudon v. First Nat'l. Bank*, 15 B. R. 476.

The mere fact that the creditor was not present when the transfer was made and knew nothing of the transaction, does not affect its character. If, when informed of it, he does not repudiate it, but accepts benefits under it, he is as much bound by the acts of his agent in accepting the transfer as if he had accepted himself. *North v. House*, 6 B. R. 365.

Where there is collusion between the creditor and the debtor, or delay in issuing the execution, or a use of the judgment for the purpose of preventing and obstructing other creditors in the collection of their claims, the judgment will be declared void. In re *McGie (ex parte Sanger)*, 2 B. R. 531; s. c. 2 Biss. 163; s. c. 2 L. T. B. 80; in re *Kerr*, 2 B. R. 388; s. c. 2 L. T. B. 39; in re *Schnepf*, 1 B. R. 190; s. c. 2 Ben. 72.

Knowledge on the part of the creditor of the commission of an act of bankruptcy by the debtor constitutes a reasonable cause to believe him to be insolvent, and the creditor must be held to the just and reasonable inferences from such act. *Warren v. Tenth Nat'l. Bank*, 7 B. R. 481; s. c. 5 B. R. 479; s. c. 42 How. Pr. 169; s. c. 5 Ben. 395; s. c. 10 Blatch. 493.

Money received upon notes of third parties accepted by a creditor as conditional payment of his debt is, in contemplation of law, received at the time of the delivery of the notes, without regard to the time when the money was actually paid. In other words, the actual receipt of the contents of the note relates back to the conditional payment, and converts it into an absolute one. The question of preference in the receipt



and collection of the note would have to be determined by the facts as they existed when the conditional payment was made. If the creditor was justifiable in receiving the notes when he did, in payment of his debt, then he became the owner of them, and his right to collect and receive the money on them at any subsequent time can not be affected by the fact that the debtor has since become insolvent, or that he has since learned, or has good reason to believe, that the debtor was insolvent at the time of the transfer. *In re Oulmette*, 3 B. R. 566; s. c. 1 Saw. 47.

When there is sufficient evidence to raise a legal presumption that a transfer was made, with a legal or actual intent to give, or to obtain a preference, in fraud of the policy and provisions of the bankruptcy law, the transfer can only be sustained upon very clear and satisfactory proofs to repel such presumption. *Warren v. Del., L. & West. R. Co.*, 7 B. R. 451; s. c. 10 Blatch. 493.

The mere fact that the preferred creditor may have paid a valuable consideration, or advanced money on the deed, will not validate it, if he had reasonable cause to believe the debtor insolvent at the time of its execution. *North v. House*, 6 B. R. 365.

**Knowledge.**—There is a difference between “knowing” and “having reasonable cause to believe.” *Singer v. Sloan*, 11 B. R. 433; s. c. 12 B. R. 408; s. c. 3 Dillon, 110. *Contra*, *Hamlin v. Pettibone*, 10 B. R. 172; s. c. 6 Bliss, 167; *Brooke v. McCracken*, 10 B. R. 461; s. c. 8 Pac. L. R. 102; s. c. 7 C. L. N. 10; *Webb v. Sacha*, 15 B. R. 168; s. c. 13 Pac. L. R. 28; s. c. 9 C. L. N. 156.

The amendment to this section does not apply to transactions that occurred prior to December 1, 1873. *Oxford Iron Co. v. Slafter*, 14 B. R. 380; s. c. 13 Blatch. 455; *Tinker v. Van Dyke*, 14 B. R. 112; s. c. 8 C. L. N. 335; *Barnwell v. Jones*, 14 B. R. 278; *in re John F. Lee*, 14 B. R. 89; *Slafter v. Sugar Refining Co.*, 13 B. R. 320; *Hamlin v. Pettibone*, 10 B. R. 172; s. c. 6 Bliss, 167; *Brooke v. McCracken*, 10 B. R. 461; s. c. 7 C. L. N. 10; s. c. 8 Pac. L. R. 102; *Warren v. Garber*, 15 B. R. 409. *Contra*, *Booth v. Neely*, 12 B. R. 398; *Singer v. Sloan*, 11 B. R. 433; s. c. 12 B. R. 208; s. c. 3 Dillon, 110.

The creditor's knowledge of the fraud may be established by circumstantial evidence. *Gattman v. Honea*, 12 B. R. 493; s. c. 7 C. L. N. 395; s. c. 10 Pac. L. R. 4; *Loudon v. First Nat'l. Bank*, 15 B. R. 476.

The circumstances attending a transaction may be such that the creditor will not be justified in relying on the debtor's false statement as to his condition. *Bucknam v. Goss*, 13 B. R. 337.

The burden of proving knowledge rests on the assignee. *Crump v. Chapman*, 15 B. R. 571.

**Definition of Fraud Upon the Act.**—The act was designed to secure an equal distribution of the property among the creditors, and any transfer made with a view to secure the property or any part of it to one, and thus prevent such equal distribution, is a transfer in fraud of the act. *Toof v. Martin*, 4 B. R. 488; s. c. 6 B. R. 49; s. c. 1 Dillon, 203; s. c. 13 Wall. 40; *Wager v. Hall*, 5 B. R. 181; s. c. 3 Bliss, 28; s. c. 16 Wall. 584; *Shawhan v. Wherritt*, 7 How. 627; *in re Rufus Hoyt*, 1 N. Y. Leg.

Obs. 132; *Locke v. Winning*, 3 Mass. 325; *Wakeman v. Hoyt*, 5 Law Rep. 309; *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137; *Haughey v. Albin*, 2 B. R. 399; s. c. 2 Bond, 244; s. c. 2 L. T. B. 47; in re *Black & Secor*, 1 E. R. 353; s. c. 2 Ben. 196; s. c. 1 L. T. B. 39; in re *Kingsbury et al.*, 3 B. R. 318.

It is immaterial whether the parties have the provisions of the bankruptcy act in contemplation or not. *Foster v. Hackley & Sons*, 2 B. R. 406; s. c. 2 L. T. B. 8; s. c. 1 C. L. N. 137.

Ignorance of the provisions of the statute constitutes no excuse. *Lewis v. Sloan*, 68 N. C. 557.

An act which directly and manifestly tends to defeat the purpose and policy of the bankruptcy act, and which is done in contravention of and with the intent to defeat such purpose and policy, is fraudulent and void. A fraudulent contrivance, with a view to defeat the bankruptcy law, is void. When a person has shown his inability to meet his engagements, one creditor can not, by collusion with him, obtain a preference to the injury of others. Such conduct is considered a fraud on the act, whose aim is to divide the assets equally and, therefore, equitably. *Beattie v. Gardner*, 4 B. R. 323; s. c. 2 Ben. 479; in re *Gregg*, 4 B. R. 456; *Buchanan v. Smith*, 4 B. R. 397; s. c. 7 B. R. 513; s. c. 8 Blatch. 153; s. c. 16 Wall. 277.

**Recovery where there is a Surety.**—Although the term “indorser” is not specifically used in this section, it is the clear intention of the law to make any payment or preference to an indorser or other surety, fraudulent and void, where the other elements in the transaction exist to give it that character. The payment of an indorsed note before maturity, by an insolvent debtor, is a preference to the indorser, and the money may be recovered from him. It is true that the legal liability as indorser can not be legally enforced until the maturity of the note, and demand of the maker, and notice of nonpayment; yet, in the statutory sense of the term, there is a liability of the indorser from the date of the indorsement. When the indorser is solvent, the payment does not give a preference to the holder. The holder is not benefited, as he would have been paid at once by the indorser when the note became due. *Ahl et al. v. Thorner*, 3 B. R. 118; s. c. 2 Bond. 287; s. c. 1 L. T. B. 129.

When the surety or indorser is innocent of all participation in any scheme by the principal debtor to contravene the law, and the debt is paid at or before maturity without any action on his part, he is not liable. *Bean v. Laffin*, 5 B. R. 333.

A mortgage given to secure money loaned to the debtor for the purpose of taking up certain notes upon which the mortgagee was liable as indorser can not be sustained as a mortgage given for a present consideration. If it could be, all an indorser or surety need do to obtain valid security for his liability would be to lend his principal the amount with which to pay the debt, and receive back a mortgage as security for the loan. Such a proceeding, within the purview of the bankruptcy act, is nothing more than an exchange or substitution of securities—a mere attempt and contrivance to relieve or protect an indorser or surety; and, whatever means may be adopted to accomplish this purpose, it will

prove invalid under the bankruptcy law when it is designed and used to obtain a preference for the party who is under a liability for the bankrupt. Under such circumstances, the security would, in all respects, have been equally valid if it had been so drawn as, in terms, to indemnify the indorsers or sureties on the notes for which they were liable. *Scammon v. Cole*, 3 B. R. 393; s. c. 5 B. R. 257; s. c. 2 L. T. B. 103; *Cookingham v. Morgan*, 5 B. R. 16; s. c. 7 Blatch. 480.

Property which has been mortgaged to a creditor who is fully secured by an indorsement, may be recovered from the creditor, and the mortgage may be declared void. *Graham v. Stark*, 3 B. R. 357; s. c. 3 Ben. 520.

The payment of an overdue note to the holder may be avoided as a preference, although the indorser was solvent. The statute intended, in pursuance of its policy of equal distribution, to exclude both the holder of the note and the surety, or indorser, from the right to receive payment from an insolvent debtor. It is forbidden. It is made by the statute equally the duty of the holder of the note and of the indorser to refuse to receive such payment. *Bartholow v. Bean*, 10 B. R. 241; s. c. 18 Wall. 635.

If an accommodation indorser merely induces the bankrupt to give a check on the bank which holds the note in order to pay it, he is not liable to the assignee. *Blair v. Allen*, 3 Dillon, 101.

If a feme covert indorses a note for the accommodation of the bankrupt, without expressly making the debt a charge upon her separate estate, she is not liable for money paid as a preference to the holder. *Flanders v. Abbey*, 6 Bliss. 16.

If the money received by the holder of a note signed by the bankrupt, and a surety from the bankrupt is recovered by the assignee as a preference, the holder may recover the full amount from the surety. *Watson v. Poague*, 15 B. R. 473; s. c. 42 Iowa, 582.

**Transfer merely Voidable.**—Until the debtor becomes amenable to the bankruptcy court by the commencement of proceedings in bankruptcy, the question whether a conveyance is in violation of the provisions of the bankruptcy law can not be raised. *Atkins v. Spear*, 49 Mass. 490.

A judgment or attaching creditor is entitled to take under his levy or attachment all that then rightfully belongs to his debtor, and no more, inasmuch as he stands merely in the place of the debtor. If the property is then covered by a conveyance which is valid under the State laws, but void only under the bankruptcy law, the title of the assignee, as soon as he is appointed, goes back by relation to the time when the conveyance was executed, so that his title will overreach that derived from any levy or attachment subsequent to that time. *Everett v. Stone*, 3 Story, 446.

When the property upon which a mortgage was given by the debtor has been sold by the assignee, the preferred creditor can not foreclose the mortgage, even though he was not made a party to the proceedings for sale, for he can not show a right superior to that of the purchaser. *Whipps v. Ellis*, 7 Bush, 268.

A party who has received a transfer of goods from the debtor may

maintain an action against the sheriff for a levy thereon, although the transfer is void under the bankruptcy law. *Hathaway v. Brown*, 18 Minn. 414.

The maker of a promissory note can not set up as a defense that the payee assigned it to the holder in fraud of the bankruptcy law, with the intent to prefer his creditor. *Frenzel v. Miller*, 37 Ind. 1.

A mortgage given for a consideration passed at the time of its execution, and also to secure a pre-existing debt, being void in parts as to the pre-existing debt, is void as to the whole. *Tuttle v. Truax*, 1 B. R. 601.

If the mortgagee gave a full present consideration at the time of the execution of the mortgage, but consented to include therein a claim due to another, the mortgage will be valid as to his claim. *In re Stowe*, 6 B. R. 429.

If the mortgage is made in part to prefer the mortgagee as to his claim, and in part to secure a present loan made for the purpose of enabling the debtor to prefer another creditor, it is entirely void. *Bucknam v. Goss*, 13 B. R. 337.

If a creditor advances the money to pay off a prior execution, and then takes a judgment for the advance and his own debt, his execution will be good to the extent of the advance. *Lathrop v. Drake*, 13 B. R. 472; s. c. 91 U. S. 516.

If the assignee elects to avoid a transfer, he takes the property subject to any prior liens held by the creditor and not abandoned in accepting the transfer. *Avery v. Hackley*, 11 B. R. 241; s. c. 20 Wall. 407.

A bailee who receives the possession of property from a preferred creditor can not, in an action of replevin by the bailor, set up a title subsequently acquired by him from the debtor's assignee. *Nudd v. Montanze*, 38 Wis. 511.

If a preference given upon the surrender of a valid security is set aside, the surrender may in equity be deemed to be annulled, and the security revived. *Burnhisel v. Firman*, 11 B. R. 505; s. c. 22 Wall. 170.

If a purchase by a mortgagee of the mortgaged property is set aside as a preference, he has the right to assert his lien by virtue of his mortgage so far as that is valid. His purchase does not impair his rights under the mortgage, but on the failure of the title which he supposed that he got by the purchase, he will be restored to his rights as a mortgagee as they existed before he attempted to purchase. He will lose his title under the purchase, and nothing more. *In re Kahley*, 4 B. R. 378; s. c. 2 Biss. 383.

**Bona Fide Purchaser.**—A bona fide purchaser for value at a sale under an execution, without notice of the invalidity of the judgment, has a good title as against the assignee. Where the judgment is apparently a valid lien under the State law, constructive notice of the pendency of proceedings in bankruptcy will not affect his title. *Zahm v. Fry*, 9 B. R. 516; s. c. 21 Pitts. L. J. 155; s. c. 31 Leg. Int. 197.

A person who purchases from a preferred creditor will not be protected unless he is a bona fide purchaser without notice and for value. He is not a bona fide purchaser without notice, if he knows facts suffi-

cient to put a man of ordinary care and prudence upon inquiry. He must, however, not only have no notice, but he must have paid a consideration at the time of the transfer, either in money or other property, or by a surrender of existing debts or securities. Executing notes for the whole amount which are overdue and still remain in the hands of the payee, is not sufficient. *Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186.

Where the security for a note is void under the bankruptcy law, an indorsee for value obtains no better right than the payee if the security is not of a negotiable character. The security passes with the note only as an incident, and is subject to the same defense in the hands of the indorsee as it would have been in the hands of the payee. *In re Kansas City Manuf. Co.*, 9 B. R. 76.

A purchaser who takes only the "right, title and interest" of the grantee, without any covenants as to title, takes the property subject to all the infirmities of the original title, and can claim as against the assignee no more than the grantee himself could. *Morse v. Godfrey*, 3 Story, 364.

A party who pays no new consideration upon the faith of the transfer, but merely takes it as an auxiliary security for an antecedent debt or liability, is not a purchaser for a valuable consideration. *Ibid.*

The pendency of the proceedings in bankruptcy is constructive notice thereof to all purchasers from the grantee, and they are affected thereby. *Ibid.*

**What may be Recovered.**—The language of the statute, authorizing the assignee "to recover the property, or the value of it, from the person so receiving it, or so to be benefited," does not create a qualification or limitation of power. The words are those of caution merely, and give the assignee no power that he would not possess if they had been omitted from the statute. *Fox v. Gardner*, 12 B. R. 137; s. c. 21 Wall. 475.

Although the act declares that the assignee may recover the property or its value, yet it is to be construed as giving a right to recover the latter only as a substitute for the former, in cases where the property has been destroyed, or has passed beyond the control of the creditor, or been constructively converted to his own use by a refusal to deliver the same upon the demand of the assignee. *Schuman v. Fleckenstein*, 15 B. R. 224; s. c. 9 C. L. N. 174.

When property is levied upon and sold under execution, before the proceedings in bankruptcy begin, the State court has a rightful jurisdiction at the time to seize and sell the same, and the assignee can not follow the property, but must resort to the State court to lay in his claim as the rightful owner of the fund against the preferred creditors. *Rohrer's Appeal*, 62 Penn. 498.

The amount which the assignee is entitled to recover from a creditor who has received a preference by means of a judgment is the gross amount obtained on execution, without any deduction for the costs and expenses of the creditor. The sum appropriated as costs and fees for attorney must be considered as having been paid by the creditor, after it was received under the judgment. *Street v. Dawson*, 4 B. R. 207;

*Bill v. Beckwith*, 2 B. R. 241; *Traders' Nat'l. Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87; *Sedgwick v. Millward*, 5 B. R. 347.

The measure of the damages is the value of the property and not the amount realized by a sale under an execution. *Clarion Bank v. Jones*, 11 B. R. 381; s. c. 21 Wall. 325; s. c. 2 A. L. T. (N. S.) 135.

If the creditor, upon being released from the effect of an injunction, chooses to sell the property under an execution, he does so at his own risk, and may be held liable for the value, if that exceeds the proceeds of the sale. *Anderson v. Strasburger*, 6 Ben. 372.

If the evidence does not show what the value of the property was, the assignee, where the property has been sold by the sheriff, can only recover the amount indorsed upon the execution. *Christman v. Haynes*, 8 B. R. 528; *Anderson v. Strasburger*, 6 Ben. 372.

When the proceedings are in the nature of equity proceedings, the court may, in its discretion, make a decree for the net, instead of the gross, amount received. *Wilson v. Brinkman et al.*, 2 B. R. 468; s. c. 1 C. L. N. 133; *Brock v. Terrell*, 2 B. R. 643.

The court can not allow, by way of reduction, the amount paid to other unpreferred creditors out of the proceeds of property conveyed in fraud of the bankruptcy act, nor so much thereof as they would have been entitled to receive on an equal distribution of the estate. The direction of the law is, that the assignee may recover the property or its value. The debtor can not be allowed to make the distribution of his estate. *White v. Raftery*, 3 B. R. 221; s. c. 1 C. L. N. 361; s. c. 16 Pitts. L. J. 110; *Bill v. Beckwith*, 2 B. R. 241; *North v. House*, 6 B. R. 365.

Money paid by a check drawn on the creditor himself, and money held by an attachment laid by the creditor in his own hands, may be recovered. If the creditor had stood on his right of set-off, it might possibly have been available; but when he treats it as the bankrupt's property, and endeavors to secure an illegal preference, by getting the bankrupt to make a payment in the one case and seizing it by attachment in the other, both appropriations will be void. *Traders' Nat'l. Bank v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; s. c. 2 Biss. 423; s. c. 14 Wall. 87.

The creditor is also liable for the interest from the time of the receipt of the money. *Ibid.*

The creditor is only liable to the assignee for what came into his hands from or through the bankrupt, and was not returned to him or his representative, the assignee. He may employ the debtor at a reasonable compensation to take charge of the property transferred, and deduct the amount actually paid from the sum that comes into his hands. In case of a void assignment, he may also deduct compensation for his own services. *Cutlin v. Foster*, 3 B. R. 540; s. c. 1 Saw. 37; s. c. 1 L. T. B. 192.

The assignee holds the title to the property conveyed by way of preference, and the bankruptcy law entitles him to recover it, or the value of it. If a conveyance has been made, or incumbrance imposed on the property by the person claiming it as purchaser under the bankrupt, the law permits the assignee to sue for and recover the value. It

thus enables the assignee to ratify and confirm the sale, prevents litigation, and at the same time fully secures the rights of creditors. He may release or quitclaim to the purchaser his interest as assignee, so as effectually to cure any defect there might be in the title by reason of the proceedings in bankruptcy and the assignment to him. *Winslow v. Clark*, 2 Lans. 377; s. c. 47 N. Y. 261.

If a transfer is set aside on technical or other grounds entirely consistent with good faith in the transferee, and he appears to have acted under an honest mistake, it may be proper to allow him the amount of the liens which he has paid in order to obtain the benefit of the transfer, but no such allowance will be made where he obtains the property by means which are a clear fraud upon the bankruptcy act, and under circumstances which make it a fraud upon other creditors, and afford a presumption of an unlawful intent on his part. *Cookingham v. Morgan*, 5 B. R. 16; s. c. 7 Blatch. 480.

When the circumstances of the case and a doubt of the bona fides of the transaction make it reasonable that the assignee should file the bill, it may be dismissed without costs to either party. *Collins v. Gray*, 4 B. R. 631; s. c. 8 Blatch. 483.

Where a commission merchant continues to deal with the debtor after he has reasonable cause to believe him to be insolvent, he may be compelled to account for the excess of the consignments over the advances subsequent to that time. *Harrison v. McLaren*, 10 B. R. 244.

Where usury has been exacted of the bankrupt, the excess above the legal rate of interest may be recovered, although the debt has been merged in a judgment in a State court. *Shaffer v. Fritchery*, 4 B. R. 548; *Tiffany v. Boatmen's Saving Institution*, 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 14; s. c. 18 Wall. 376.

When the transfer includes articles exempt from levy and sale on execution, the assignee can not recover them or their value. They do not pass to the assignee, nor can their proceeds be distributed as assets, nor can any creditor have any claim to or interest in them. *Grow v. Ballard et al.*, 2 B. R. 254; s. c. 1 L. T. B. 111; *Brock v. Terrell*, 2 B. R. 643.

The assignee is entitled to recover the full amount, although the creditor previous to the payment had drawn a check for a part thereof, which had not been presented or accepted or paid, for the simple drawing of a check does not transfer the fund. *Strain v. Gourdin*, 11 B. R. 156; s. c. 2 Woods, 380.

ACT OF 1898, CH. 7, § 67. **Liens.**— (a) Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

(b) Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such

bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

(c) A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent, and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

(d) Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act.

(e) That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are



held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.

(f) That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

ACT OF 1898, CH. 7, § 70. \* \* \* **Avoiding transfers.**— \* \* \*

(e) The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it except a bona fide holder for value.

A chattel mortgage on the present and after-acquired property of the mortgagor, which by its terms asserts that its purpose is that the lien may attach to all new goods brought into the store, and be released from all such as are sold in the due course of a regularly conducted business, so that such mortgage may be a continuing one, is void. *In re Bloom*, 17 B. R. 425.

A mere promise to pay out of a particular fund, when received, the promisor retaining control of such fund, and no notice being given to the person who is to pay, creates no lien upon such fund. *Ex parte Tremont Nail Co., in re Middleboro Shovel Co.*, 16 B. R. 448.

Docketing a judgment, under the laws of New York, obtains a lien on the land of the judgment debtor within the county as land, but no lien on the rents and profits of the same. *Conover et al. v. Dumahaut*, 17 B. R. 558.

A judgment creditor does not acquire a lien protected under the bankruptcy law by commencing proceedings supplementary to execution; until the appointment of a receiver his right is not a lien within the meaning of the bankruptcy law. *In re Wheeler & Lang*, 18 B. R. 385.

Decrees enrolled against a debtor are not liens upon property purchased by him while insolvent in the name of his wife, but a court of equity will pursue, for the benefit of creditors, the means thus invested, and the lien in equity attaches on filing the bill. *Winters v. Claitor*, 18 B. R. 533.

A creditor can not obtain an equitable lien on the property interests of his debtor by suit brought after the latter has been declared a bankrupt. *Ibid.*

Under laws of Vermont, attachment of a debt by trustee process creates a lien on the funds in the hands of the trustee, after service upon him, although no notice is given to principal debtor. Such lien is a lien by attachment by mesne process, and will be saved when made the prescribed length of time before bankruptcy. *In re Peck*, 16 B. R. 43.

For facts and circumstances which would put a creditor on notice of debtor's insolvency, see *Lloyd, Assignee, v. Strowbridge*, 16 B. R. 197; *in re Armstrong*, 16 B. R. 275; *Dutcher v. Wright*, 16 B. R. 331.

Where the agent of creditor had reasonable cause to believe the debtor insolvent, and knew the act was in fraud of the bankruptcy law, it is the same as if the creditor had himself taken part therein, with the same cause to believe and the same knowledge. *Sage, Jr., v. Wynkoop, Assignee*, 16 B. R. 363.

Knowledge on part of agent of fraudulent intent and effect of a transaction is imputed to principal. *Ibid.*

A debtor's passive nonresistance to an action is not necessarily a fraud on the bankruptcy act, although he may be insolvent in contemplation of that act. *Louchheim v. Henzey*, 18 B. R. 173.

Conveyance made in fraud of creditors was, under the law of 1867, voidable, and not void, and the property embraced in it did not absolutely vest in assignee as part of the bankrupt's estate. *Phelps v. Curts*, 16 B. R. 85.

A delay of more than three months in filing petition in bankruptcy, after the execution and delivery of an assignment for the benefit of creditors, would under the law of 1867 deprive an assignee of right to possession of the property assigned. *In re Kimball*, 16 B. R. 188.

An assignee may petition summarily to set aside a mortgage given after commencement of proceedings in bankruptcy. Resort to a bill in equity is unnecessary. *In re Sims*, 16 B. R. 251.

A general assignment made in fraud of the bankruptcy act may be set aside if the proceedings are commenced within the time prescribed by the act. *In re Temple*, 17 B. R. 345.

Under law of 1867 it was held that until a general assignment for benefit of creditors has been set aside, the title to property embraced in it remains in the assignee, and does not vest in the assignee in bankruptcy by the mere force of an adjudication and his appointment as assignee. *Belden, Assignee, v. Smith*, 16 B. R. 302.

An assignment for benefit of creditors, without preferences, made in good faith, with no fraudulent intent, is valid. *Haas, Assignee, v. O'Brien*, 16 B. R. 507.

In North Carolina a bond for title given on executory contract for purchase of lands conveys an equitable estate in the land to the vendee, which is assignable. And assignment of such estate to indemnify sureties made without intent to delay or defraud creditors is valid, and the assignee is entitled to priority over judgment creditors of the assignor. *In re Wm. P. Reynolds*, 16 B. R. 158.

Such assignment is valid, although no money is paid. The debt upon which the sureties are liable furnishes a sufficient consideration to support it. It need not be registered to be available against creditors, unless the time limited by statute for the registration of a bond has expired. *Ibid.* But see § 67, Clause D, of Law of 1898.

An insolvent exchanged \$500 worth of wheat for a wagon and team, with view to claim the latter as exempt from operation of bankruptcy law, by reason of its being exempt property under Oregon Civil Code. Held, void, and title to wheat vested in assignee. *Semble*, that assignee may elect to take wagon and team as price or value of the wheat, and thereby affirm the exchange. *In re Parker & Morris*, 18 B. R. 43.

When a secured creditor takes goods in fair exchange for the security, the transaction is not in fraud of the bankruptcy law. *Halleck & Bro. v. Tritch*, 17 B. R. 293.

In an action to recover from a vendee goods sold on the eve of bankruptcy, it must be established not only that the bankrupts intended to dispose of their property in fraud of the act, but that defendant knew such to be their intention, and guiltily combined and colluded with them. *Dickinson v. Adams*, 17 B. R. 380.

Where one member of a firm, doing a very large but failing business, on a limited capital, withdraws over one-third of his share of the capital to build upon property which he conveys to his wife, but which appears upon the firm books as an investment of the firm, until charged up to him after an assignment by such firm prior to an adjudication in involuntary bankruptcy; Held, such conveyance to the wife was void, and the assignee was entitled to the proceeds of the property as against a joint creditor who had taken a mortgage thereon as security for his debts. *Phipps v. Sedgwick, Assignee*, 16 B. R. 64.

Bankrupt owner of twenty bonds of like character and value, held by ballee, sold six of them to defendant and received pay therefor prior to the bankruptcy: Held, that the rights of such purchaser were superior to those of the assignee in bankruptcy. *Hamilton v. Nat. Loan Bk.*, 18 B. R. 97.

Where one of the motives which prompts a conveyance by one member

of the firm to his partner of his interest in such firm, is to hinder and defeat creditors, such conveyance is fraudulent at common law, and is denounced by the express provisions of the bankruptcy act, although other considerations may also have induced the conveyance. *Burrill v. Lawry*, 18 B. R. 367.

A creditor of the bankrupt, having issued an attachment against him, defendant, who was the bankrupt's partner, procured a delay of its execution, and in the meantime purchased the bankrupt's interest in the firm for \$400, without taking account of stock or of firm debts and assets. The purchase money was returned to defendant, who placed it in a safe, from which it was drawn out by the bankrupt from time to time as he called for it. In an action by the assignee in bankruptcy to invalidate the sale, defendant claimed that he purchased the bankrupt's interest for the sole purpose of getting rid of him and protecting his own interests. Held, that both parties to the transaction were chargeable with having contemplated the result accomplished thereby, and must be considered guilty of intending to hinder and delay this creditor in obtaining security for his demand. *Ibid.*

Where the marshal demanded and received of a sheriff property which the latter held under execution levy, and delivered same to assignee, an action for a wrongful taking and conversion can not be maintained by judgment creditor against the assignee. *Ansonia Brass & Copper Co. v. Pratt*, 16 B. R. 170.

Such action can not be maintained in the State court, as the enforcement of a lien upon funds in the hands of assignee acquired by virtue of the judgment. Such lien can only be enforced in bankruptcy court. *Ibid.*

In Colorado the delivery of an execution to the sheriff constitutes such a lien upon the debtor's property as will be valid against proceedings in bankruptcy filed after such delivery but before a levy is made. *Bartlett, Assignee, v. Russel*, 16 B. R. 211.

This is also the law in the State of New York. *In re Payne*, 17 B. R. 37.

A judgment recovered after the making of a general assignment for the benefit of creditors, without preferences, and valid by the laws of the State where made, creates no cloud upon the title of property transferred by the assignment, although such assignment be subsequently set aside upon the application of an assignee in bankruptcy. *Belden, Assignee, v. Smith*, 16 B. R. 362.

Subsequent executions create a lien on all the debtor's property in the sheriff's hands not covered by a prior attachment. *In re M. J. Nelson*, 16 B. R. 312.

A levy which has been relinquished before filing of a petition in bankruptcy creates no lien upon the property as against the assignee. *Sage, Jr., v. Wynkoop, Assignee*, 16 B. R. 363.

Where a judgment is docketed, and thereafter a petition in bankruptcy is filed against the judgment debtors, and after the filing of such petition, but before appointment of an assignee, proceedings supplementary to execution were instituted upon the judgment, and a receiver was

appointed by the court in which the judgment was rendered: Held, that title of subsequently-appointed assignee in bankruptcy related back to the date of filing petition in bankruptcy, and cut off title of receiver to rents and profits of the judgment debtor's lands. *Conover v. Dumahaut*, 17 B. R. 558.

Assignment to assignee duly appointed in bankruptcy proceedings dissolves lien of attachment levy within four months prior to filing of petition. *Duffield v. Horton*, 16 B. R. 59.

And a debtor of the bankrupt who has, in ignorance of the appointment of the assignee, paid the amount of his indebtedness to the sheriff under execution in the attachment suit, is not thereby relieved from his liability to the assignee. *Ibid.*

Order of State court in attachment suit for sale of goods attached, as perishable, is no protection to a sheriff when order is made after filing of petition in bankruptcy, though before adjudication. *Ibid.*

Note.—Under the law of 1867, as it appears in the United States Revised Statutes, the assignment to the assignee in bankruptcy relates back to the commencement of the proceedings in bankruptcy, and by operation of law vests the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings. U. S. Rev. Stat., § 5044.

Under this section see the following decisions:

An execution lien obtained in good faith before bankruptcy, on the individual property of member of partnership firm under a judgment against the firm, will not yield to the equities of the separate creditors of that partner. *In re Sandusky*, 17 B. R. 452.

The attachment referred to in the above section is an attachment on mesne process; it does not relate to proceedings on final process. *Storer et al. v. Haynes*, 18 B. R. 354.

Where judgment was recovered, and process issued thereon to sell the attached property, its lien relates back to the service of attachment, and there is then no attachment process in existence upon which this section can operate in case of subsequent bankruptcy proceedings. *Hudson v. Adams*, 18 B. R. 102; *Shelley et al. v. Elliston*, 18 B. R. 375.

For cases holding that a valid execution lien is not affected by this section, and for discussion of what are such valid execution liens, see *in re Hull*, 18 B. R. 1; *in re Stockwell et al.*, 18 B. R. 144; *Storer et al. v. Haynes*, 18 B. R. 354; *in re Wheeler & Lang*, 18 B. R. 385; *in re Blesenthal & Henschel*, 18 B. R. 120.

ACT OF 1867, § 5129. If any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to be-

lieve him to be insolvent, or to be acting in contemplation of insolvency, and<sup>1</sup> knowing that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this Title,<sup>2</sup> or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this Title, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt.

Statute revised — March 2, 1867, ch. 176, § 35, 14 Stat. 536. Prior Statute — Aug. 19, 1841, ch. 9, § 2, 5 Stat. 442.

This and the preceding sections differ mainly in their application to two different classes of recipients of the bankrupt's property or means. The preceding section is limited to a creditor or person having a claim against the bankrupt or who is under any liability for him, and who receives the money or property by way of preference; and this section applies to the purchase of property of the bankrupt by any person who has no claim against him, and is under no liability for him. That the preceding section is confined to persons of that character named can not well be doubted, since the acts therein mentioned are acts done with persons of that character, and must be done with a view to giving such a person a preference over others of the same class. That this section has reference to another class of persons, and is governed by other rules, seems to be strongly sustained by these considerations: 1st. The sale, or other transfer of property mentioned in it, need not be in preference of a creditor or person liable for the bankrupt to render it void. 2d. It need not be made to a person of that character. 3d. In the preceding section the transfer may still be valid, although within all other conditions of the clause, if made more than four months before the filing of a petition in bankruptcy, while the transfer described in this section requires that it shall have been made more than six months before the filing of the petition to have the same effect. Congress seems to have thought that in case of a creditor who had parted with his money or property to the insolvent party, and whose reasons for further dealing with him were more pressing, in order that he might be saved from an impending loss, the time which should secure the transaction from the effect of the bankruptcy act should be less by two months than in the case of one who has no such incentive to action, because he is a voluntary purchaser of an insolvent's property, with knowledge of his insolvency. *Bean v. Brookmire et al.*, 4 B. R. 196; s. c. 1 Dillon, 24.

The preceding section was intended to refer to the past, and this section to the present. The language employed in the preceding section im-

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<sup>1</sup> So amended by act of June 22, 1874, ch. 390, § 11, 18 Stat. 180.

<sup>2</sup> So amended by act of February 18, 1875, ch. 80, 18 Stat. 320.

ports clearly that the consideration must be one growing out of a former transaction, and that the recipient must stand in the relation thus created to the other party. It is equally clear that this section must be limited to cases where the transaction in question was original and complete in itself at the time it occurred, and had no reference for its consideration to anything between the parties which had gone before it. It is only by this construction that the two sections can be made to harmonize, and full and distinct effect be given to each. A mortgage for a present consideration is within this section. *Gibson v. Warden*, 14 Wall. 244.

This and the preceding sections must be construed together, and a scope of operation given to each of them if possible. Some effect must be given to the four months' limitation. This section, with its six months' limitation, is to be held to cover every case, as well that of a preference to a creditor, as all other cases; the preceding section is useless, and might as well have been omitted. But the partial clause precedes the general clause. The preceding section provides for the case of a transaction done with a view to give a preference to a creditor or person having a claim against the debtor, or who is under any liability for him. In such case, if the transaction takes place within four months before the filing of the petition in bankruptcy, and the other circumstances specified exist, the transaction is made void. This section must be held to be intended to provide for any disposition of property that is not provided for by the preceding section—that is, for any disposition that does not give such a preference as the preceding section provides for. But whenever a case falls within the preceding section, it must, although it may be also in terms within this section, be tested as to its validity, and as to the limitation of time prescribed exclusively by the provisions of the preceding section. *Hubbard v. Allaire Works*, 4 B. R. 623; s. c. 7 Blatch. 284; *Coggeshall v. Potter*, 4 B. R. 73; s. c. 6 B. R. 10; s. c. 1 Holmes, 75; *Babbitt v. Walbrun & Co.*, 4 B. R. 121; s. c. 6 B. R. 350; s. c. 1 Dillon, 19.

This limitation does not, per se, determine what property shall vest in the assignee. There are transfers that may be impeached, even though they were made more than six months before the filing of the petition. *Smith v. Ely*, 10 B. R. 553.

A sale made by a debtor will be fraudulent if the following facts concur:

1st. If the debtor is insolvent, or contemplates insolvency or bankruptcy.  
2d. If the purchaser, when he buys the goods, has reasonable cause to believe the debtor to be insolvent, or to be acting in contemplation of insolvency.

3d. And knows that the sale was made by the debtor with a view to prevent, etc., or to defeat, etc., or to evade, etc., the provisions of the bankruptcy act.

Sales so made are void, and in fraud of creditors and their rights under the bankruptcy law. And, as against the immediate vendee, and all actual participators, such sales, if made out of the usual and ordinary course of business—as when an insolvent merchant sells out all his stock and property—are prima facie evidence of fraud; that is, of the foregoing elements constituting a fraudulent sale. But it is only prima facie, and

the presumption may be rebutted by evidence aliunde to be produced by the vendee. An instruction to the jury which omits some of the essential elements of fraud, or declares a sale out of the ordinary course of the debtor's business necessarily, instead of presumptively, fraudulent, is erroneous. *Babbitt v. Walbrun & Co.*, 4 B. R. 121; s. c. 6 B. R. 359; s. c. 1 Dillon, 19; *Andrews v. Graves*, 5 B. R. 279; s. c. 1 Dillon, 108.

The presumption of fraud arising from the usual nature of the sale can only be overcome by proof on the part of the buyer that he took the proper steps to find out the pecuniary condition of the seller. All reasonable means pursued in good faith must be used for this purpose. Merely inquiring the object of the debtor in selling is not sufficient. *Walbrun v. Babbitt*, 6 B. R. 359; s. c. 9 B. R. 1; s. c. 16 Wall. 577.

The degree of inquiry which devolves as a duty upon a person who proposes to make a purchase out of the usual course of business of the seller depends upon the circumstances of the particular transaction. Such a person must in all cases make a reasonable inquiry as to the right of the seller to make the proposed sale. *Schulenberg v. Kabureck*, 2 Dillon, 132.

Where the circumstances are very suspicious, the purchaser may be held to make diligent inquiry. *Schulenberg v. Kabureck*, 2 Dillon, 132.

The mere fact of sales at low prices does not make them sales out of the usual and ordinary course of business of the vendor, and so prima facie evidence of fraud. The business of a purchaser is to buy as cheaply as he can. Many men relieve themselves from temporary embarrassments when money is dear, by sacrificing property at low prices to meet their obligations. Such acts are often praiseworthy and successful, and much to be preferred for their own interests and those of their creditors to the incurring of new obligations at exorbitant rates of interest. *Sedgwick v. Lynch*, 8 B. R. 289; s. c. 5 Ben. 489.

A debtor whose failure is ultimately caused by his inability to collect debts due to him, can not be said to have been insolvent or in contemplation of insolvency merely because he was selling his goods at a sacrifice, if he at the time had reasonable cause to believe that he would be able to avoid a failure. *Sedgwick v. Lynch*, 8 B. R. 289; s. c. 5 Ben. 489.

The fact that the debtor put his paper on the street through brokers, is not conclusive evidence that he is insolvent, for a man may sell his paper on the street at a great sacrifice to effect a purpose deemed beneficial by him, and still not be insolvent. *Tiffany v. Lucas*, 5 B. R. 437; s. c. 8 B. R. 49; s. c. 1 Dillon, 164; s. c. 15 Wall. 410.

The presumption is that street brokers act for others and not themselves. Where a note is offered for discount by a street broker, with the indorsement of a party who is known to have no occasion to go on the street to get paper discounted, the purchaser, in the absence of other evidence, will be presumed to know that it is accommodation paper. *Tiffany v. Boatman's Sav. Inst.*, 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 11; s. c. 18 Wall. 376.

The admission in a deed of trust of the inability of the grantor to meet his debts, is sufficient notice of the fact to the grantee. *Stobaugh v. Mills*, 8 B. R. 361; s. c. 5 C. L. N. 526.



A person advancing his own money to a trader or other person in business, and taking security from him out of the ordinary course of business, is liable to reconvey the security, although the only fraud intended by the debtor is the payment of a creditor by way of preference. As the assignee can recover from the creditor, who is the party benefited, the court, upon application of the mortgagee, may, on proper terms, direct the assignee to bring an action against the creditor. *In re Butler*, 4 B. R. 303; s. c. *Lowell*, 506.

If security is taken for a loan made for the purpose of extinguishing liens upon the debtor's property, and the money is actually so applied, it is valid. *Gaffney v. Signalgo*, 1 Dillon, 158.

The claim of an attorney for services in drawing up and attending to the business connected with the assignment can only be allowed on proof as any other claim. *In re George Lains*, 24 Pitts. L. J. 207.

A trustee is not entitled to priority on a claim for personal services rendered in the execution of the trust. *Ibid.*

The trustee is entitled to an allowance for disbursements legitimately made in the execution of his trust before the debtor was adjudged bankrupt. *Ibid.*

If the debtor's father-in-law, when the debtor is known by him to be insolvent, purchases his property, and applies the purchase money to pay off a mortgage upon the property of the debtor's wife, the transaction is a transfer of the debtor's property to his wife in fraud of his creditors, through the agency of his father-in-law, for the benefit of his wife and the mortgagee. *Andrews v. Graves*, 5 B. R. 279; s. c. 1 Dillon, 108.

The bankruptcy law, conceived and enacted in the belief that it provided the best mode of administering the estate of an insolvent, will tolerate no attempt by individuals to devise and carry into effect some other plan inconsistent therewith, nor permit such an attempt to be justified by the excuse that they thought such other plan wiser or better. *Cookingham v. Morgan*, 5 B. R. 16; s. c. 7 Blatch. 480.

An assignment is not absolutely void — it is merely voidable, and can not be impeached unless proceedings in bankruptcy are commenced within six months after its execution. *Maltbie v. Hotchkiss*, 5 B. R. 485; s. c. 38 Conn. 80; *in re Arledge*, 1 B. R. 644; *Beck v. Parker*, 65 Penn. 262; *Hobson v. Markson*, 1 Dillon, 421; *Reed v. Taylor*, 4 B. R. 710; s. c. 32 Iowa, 209; *in re Pierce & Holbrook*, 3 B. R. 258; s. c. 16 Pitts. L. J. 204; *in re J. S. Cohn*, 6 B. R. 379; *Sedgwick v. Place*, 1 B. R. 673; s. c. 3 B. R. 139; s. c. 3 Ben. 360; s. c. 1 L. T. B. 97; *in re Hawkins et al.*, 2 B. R. 378; s. c. 34 Conn. 548; *in re Broome*, 3 B. R. 343; s. c. 3 Ben. 488; *Cragin v. Thompson*, 12 B. R. 81; s. c. 2 Dillon, 513; *Thrasher v. Bentley*, 2 N. Y. Supr. 309; s. c. 59 N. Y. 649; s. c. 1 Abb. N. C. 39; *McLean v. Meline*, 3 McLean, 199; *McLean v. Johnson*, 3 McLean, 202; *Cornwell's Appeal*, 7 W. & S. 305; *in re Charles W. Holmes*, 1 N. Y. Leg. Obs. 211; *Weiner v. Farnum*, 2 Penn. 146; s. c. 3 Penn. L. J. 440; *in re Anon.*, 1 Penn. L. J. 323; *Sparhawk v. Drexel*, 12 B. R. 450; *McLean v. Ihmsen*, 1 West. L. J. 189.

An assignment made for the benefit of all creditors equally in good faith, and without any actual fraud or intent to defeat the operation of the statute, is valid. *Haas v. O'Brien*, 52 How. Pr. 27.

An assignment for the benefit of creditors made more than six months before the commencement of the proceedings in bankruptcy is valid as against the assignee. *Mayer v. Hillman*, 13 B. R. 440; s. c. 91 U. S. 496.

An assignment by one partner of his individual estate for the equal benefit of his individual creditors first, and the excess, if any, to be paid to his partnership creditors, may be set aside under this section. *Barnwell v. Jones*, 14 B. R. 278.

An assignment for the benefit of creditors by an insolvent debtor, is conclusive evidence of an intent to defeat the operation of the bankruptcy law, and may be set aside at the instance of the assignee. *Jackson v. McCulloch*, 13 B. R. 283; s. c. 1 Woods, 433.

The trustee and all persons claiming under an assignment are chargeable with knowledge of the terms thereof, and consequently with knowledge of the insolvency of the debtor, and his purpose to evade the operation of the bankruptcy law. *Jackson v. McCulloch*, 13 B. R. 283; s. c. 1 Woods, 433.

As the intent of an assignment is to be legally inferred from its necessary tendency, the words, "with intent to delay or defeat the operation of this act," include such a conveyance. They are words of like import with "puts his estate into a course of distribution different from that prescribed by the act," which has been the substance of the language of Lords Mansfield, Eldon, and Wensleydale. In the absence of actual fraud, an assignment, though constructively fraudulent under the bankruptcy law, is not void, but voidable; and is voidable only at the suit of the assignee in bankruptcy. In the United States, the reasons for considering an assignment an act of bankruptcy are stronger than those which prevailed in England. During more than three-quarters of a century, since the constitution enabled Congress to establish uniform laws on the subject of bankruptcies throughout the United States, there has not been such a law in force, except in two short intervals; and the usages and legislation, as to voluntary assignments for the benefit of creditors, have, in the meantime, become various in the several States. The abrogation of such local differences at the election of any nonassenting creditor is an essential part of "an act to establish a uniform system of bankruptcy throughout the United States." *Barnes v. Rettew*, 8 Phila. 133.

A trustee claiming under an assignment made within two months before the commencement of proceedings in bankruptcy against the debtor, can not maintain an action against a judgment creditor who levied on the property after the execution thereof and the commencement of such proceedings. *Dolson v. Kerr*, 52 How. Pr. 481.

If a receiver has possession of property which has been assigned for the benefit of creditors, the State court will not pass an order allowing the assignee to sue him. *Ex parte John H. Platt*, 41 N. Y. Supr. 513; s. c. 52 How. Pr. 468.

Acts done under it previously in good faith may be sustained. An injunction under such a bill may be refused when it would prevent the working out of an equity beneficial to the creditors or the completion of a beneficial sale. In re Pierce & Holbrook, 3 B. R. 258; s. c. 16 Pitts. L. J. 204; Barnes v. Rettew, 8 Phila. 133.

If the trustee has filed a bill in chancery to enforce a right claimed under the assignment, the assignee may elect to come in and prosecute the suit in his name. Freeman v. Deming, 3 Sandf. Ch. 327.

When an assignment is set aside, it is usual and proper for the decree to contain a direction for a reconveyance by the trustee to the assignee in bankruptcy. Although the decree annuls the assignment, and orders a surrender of the estate, yet the conveyance, by a deed of surrender, may effectuate or facilitate the purposes of the decree. Burkholder v. Stump, 4 B. R. 597; s. c. 8 Phila. 172.

The assignee may apply to the State court for an order upon the trustee to surrender the estate to him. Cragin v. Thompson, 12 B. R. 81; s. c. 2 Dillon, 513.

If the trustee surrenders the property to the assignee, he should be protected in so doing by the State court. Ibid.

A surrender of a part of the property to the debtor prior to the commencement of proceedings in bankruptcy will not relieve an assignee from the legal effect of the deed of trust, and he must account therefor. Stobaugh v. Mills, 8 B. R. 361; s. c. 5 C. L. N. 528.

Where the assets have been changed by the trustee, the assignee may receive the money or other proceeds in lieu thereof. McLean v. Johnson, 3 McLean, 202.

Money paid by the trustee to discharge valid liens on the property, in pursuance of the terms of the trust, can not be recovered from the secured creditor. Livingston v. Bruce, 1 Blatch. 318.

The trustee is entitled to be credited with the payments to lawful creditors made by him in accordance with the terms of the assignment, before the institution of a suit by the assignee, and is not liable to the assignee therefor. Jones v. Kinney, 4 B. R. 649; s. c. 5 Ben. 259; Cragin v. Thompson, 12 B. R. 81; s. c. 2 Dillon, 513.

The trustee is liable for the balance that remains in his hands undistributed. Jones v. Kinney, 4 B. R. 649; s. c. 5 Ben. 259; Everett v. Stone, 3 Story, 446.

A creditor who has received a payment under an assignment is liable to the assignee therefor. Jones v. Kinney, 4 B. R. 649; s. c. 5 Ben. 259; Cragin v. Thompson, 12 B. R. 81; s. c. 2 Dillon, 513.

The expenses of converting the property into money may be allowed to a trustee under an assignment. In re J. S. Cohn, 6 B. R. 379; Stobaugh v. Mills, 8 B. R. 361; s. c. 5 C. L. N. 528; Macdonald v. Moore, 15 B. R. 26; s. c. 1 Abb. N. C. 53. Contra, in re Stubbs, 4 B. R. 376.

Every person receiving an assignment, ought to know that it is liable to be set aside, if a bankruptcy follows, and the allowance to him of his charges and expenses ought to be refused where it can not be so guarded as to prevent any injurious duplication of charges. In some of the judi-

cial districts the allowance is refused wholly. No allowance can be made for the expense of a future settlement of the trustee's account in the court of a State under its laws relating to assignments. *Burkholder v. Stump*, 4 B. R. 597; s. c. 8 Phila. 172.

The trustee can not be allowed for any disbursements or expenses which he made or incurred by virtue of the assignment, or to maintain his title or possession thereunder. *Clark v. Marx*, 6 Ben. 275.

An assignment for the benefit of creditors, which gives priority to certain creditors, is not void except as against the assignee in bankruptcy. *Shryock v. Bashore*, 13 B. R. 481; s. c. 15 B. R. 283; s. c. 82 Penn. 159.

An assignment is valid as against a judgment creditor who lays an attachment in the hands of the trustee. *Cook v. Rogers*, 13 B. R. 97; s. c. 31 Mich. 391; s. c. 14 A. L. Reg. 633.

A creditor can not levy upon the property transferred by an assignment, although it is void under the bankruptcy law, for it is void only as to persons claiming in virtue of proceedings under the statute. *Dodge v. Sheldon*, 6 Hill, 9.

An assignment is void only as against the assignee. The trustee who has received the property in trust, to apply it to the payment of creditors, can not allege that the assignment was void under the bankruptcy law, without showing that the property has been recovered from him by the assignee. *Seaman v. Stoughton*, 3 Barb. Ch. 344.

If an action by the assignee against the trustee to vacate the assignment is pending, and there is no collusion, the trustee can not be compelled to account by a creditor until a definite result is reached. *In re Bowery Nat'l. Bank*, 1 Abb. N. C. 404.

If the debtor, after making an assignment, takes the benefit of a State insolvent law, which merely protects the person from imprisonment, and does not affect contracts, the property will pass to the insolvent trustee, and can not be recovered by an assignee appointed in bankruptcy proceedings subsequently commenced. *Sullivan v. Hieskill*, *Crabbe*, 525; s. c. 4 Penn. L. J. 171.

A levy under an execution issued upon a judgment obtained in the regular course of judicial proceedings is valid, although it is made after an assignment which is void under the bankruptcy law. *McLean v. Meline*, 3 McLean, 199.

The money paid by a trustee to an attorney can not be allowed. *In re J. S. Cohn*, 6 B. R. 379.

Where a judgment is obtained after the execution of an assignment, but before the commencement of proceedings in bankruptcy, the creditor should be permitted to sell the real estate, and try his right in an action of ejectment. *Reeser v. Johnson*, 10 B. R. 467; s. c. 76 Penn. 313.

When a transfer is made void as to the assignee, his title relates back to the time of the transfer, and no judgment or execution obtained or levied after the transfer and before the commencement of the proceedings in bankruptcy is a lien on the property. *In re Solomon Biesenthal*, 15 B. R. 228. *Contra*, *Macdonald v. Moore*, 15 B. R. 26; s. c. 1 Abb. N. C. 53.

A mortgage made to a person who indorses a note for the debtor is valid if the debtor never becomes bankrupt, although it was made to the in-

dorser to evade the provisions of the bankruptcy law. *Boyd v. Parker*, 43 Md. 182.

A married woman can not claim a homestead out of the property of her husband, at the same time that he seeks relief and a discharge from his debts in a court of bankruptcy. He, being fully cognizant of the action his wife is taking, and offering no objection thereto, thereby showing consent on his part, is in the same condition as if he had made a transfer of the property to his wife, and she being fully cognizant of his application for the benefit of the bankruptcy act, and accepting such transfer by the action she took, is in the same condition as if she had accepted a deed of the property from him; and such a transfer is void. *In re Askew*, 3 B. R. 575; *in re Boothroyd & Gibbs*, 14 B. R. 223.

There is nothing in the bankruptcy law which interdicts the loaning of money to an insolvent, if the purpose is honest, and the object not fraudulent; and it makes no difference that the lender had good reason to believe the borrower to be insolvent, if the loan was made in good faith, without any intention to defeat the provisions of the bankruptcy act. It is not difficult to see that in a season of pressure, the power to raise ready money may be of immense value to a man in embarrassed circumstances. With it he might be saved from bankruptcy, and without it financial ruin would be inevitable. If the struggle to continue his business be an honest one, and not for the fraudulent purpose of diminishing his assets, it is not only not forbidden, but it is commendable, for every one is interested that his business should be preserved. In the nature of things he can not borrow money without giving security for its payment, and this security is usually in the shape of collaterals. Neither the terms or policy of the bankruptcy act are violated, if these collaterals be taken at the time the debt is incurred. His estate is not impaired or diminished, as he gets a present equivalent for the securities he pledges for the repayment of the money borrowed. *Tiffany v. Boatman's Sav. Inst.*, 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 14; s. c. 18 Wall. 376; *Bentley v. Wells*, 61 Ill. 59; *in re McKay & Aldus*, 7 B. R. 230; s. c. Lowell, 561.

Clearly all sales are not forbidden. It would be absurd to suppose that Congress intended to set the seal of condemnation on every transaction of the bankrupt which occurred within six months of bankruptcy, without any regard to its character. A policy leading to such a result would be an excellent contrivance for paralyzing business, and can not be imputed to Congress without an express declaration to that effect. The interdiction applies to sales for a fraudulent object, and not to those with an honest purpose. The law does not recognize that every sale of property by an embarrassed person is necessarily in fraud of the bankruptcy act. If it were so, no one would know with whom he could safely deal, and a person in this condition would have no encouragement to make proper efforts to extricate himself from difficulties. It is for the interest of the community that every one should continue his business, and avoid, if possible, going into bankruptcy. *Tiffany v. Lucas*, 5 B. R. 437; s. c. 8 B. R. 49; s. c. 1 Dillon, 164; s. c. 15 Wall. 410; *Wadsworth v. Tyler*, 2 B. R. 316; s. c. 2 L. T. B. 28; *in re Pusey*, 7 B. R. 45; *Gillenwaters v. Millier*, 49 Miss. 150.

If it shall turn out on examination that the transfer was made by the bankrupt in good faith, for the honest purpose of discharging his indebtedness, and in the confident expectation that by so doing he could continue his business, it will be upheld. *Tiffany v. Lucas*, 5 B. R. 437; s. c. 8 B. R. 49; s. c. 1 Dillon, 164; s. c. 15 Wall. 410.

A fair exchange of value may be made at any time, even if one of the parties to the transaction is insolvent. There is nothing in the bankruptcy act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property, at any time before proceedings in bankruptcy are taken by or against him, provided such dealing is conducted without any purpose to defraud or delay his creditors, or give a preference to any one, and does not impair the value of his estate. His creditors can only complain if he wastes his estate, or gives a preference in its disposition to one over another. His dealing will stand if it leaves his estate in as good plight and condition as previously. *Cook v. Tullis*, 9 B. R. 433; s. c. 18 Wall. 332; *Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 21 Wall. 360; s. c. 10 Blatch. 204.

If a party who owes money to an insolvent debtor pays him in good faith, without having reasonable cause to believe that the latter intends to make fraudulent preferences or payments therewith, the assignee can not recover the sum so paid. *Borland v. Phillips*, 2 Dillon, 383.

A party who accepts a draft with the intent thereby to enable the drawer to give a preference to the holder, can not be compelled to pay the same. *Fox v. Gardner*, 12 B. R. 137; s. c. 21 Wall. 475.

If a party who owes money to the bankrupt, pays it to one of the bankrupt's creditors, with the intent thereby to enable him to obtain a preference, he will be deemed to still hold the money, and is liable to the assignee therefor. *Ibid.*

There is no arbitrary rule by which the good faith of a transaction can be tested. *Tiffany v. Lucas*, 5 B. R. 437; s. c. 8 B. R. 49; s. c. 1 Dillon, 164; s. c. 15 Wall. 410.

The existence on the part of the vendee of a reasonable cause to believe each of the two elementary facts, to-wit, the insolvency of the debtor, and the debtor's intention to contravene the bankruptcy act, must be satisfactorily proved to render a deed void. *Tiffany v. Lucas*, 5 B. R. 437; s. c. 8 B. R. 49; s. c. 1 Dillon, 164; s. c. 15 Wall. 410; *Judson v. Kelty*, 6 B. R. 165; s. c. 5 Ben. 348; s. c. 2 L. T. B. 218; *Bentley v. Wells*, 61 Ill. 59.

If a corporation, whose charter prohibits it from taking interest beyond a certain per cent., makes a loan, upon interest above the rate thus prescribed, to a party who is subsequently declared to be bankrupt, and takes securities therefor, the assignee can only recover the excess, and the securities will be valid for the principal debt, with legal interest. The line which separates that which is authorized from that which is prohibited, is plainly drawn, and the division easily made. The power of the corporation to make loans is expressly conferred, and therefore exists; the limitation is only as to the rate. Up to the limitation, all is good; beyond that, bad. The parties are not in pari delicto, and as to the excess above the principal and lawful interest, the corporation is under a liability to the assignee.

*Tiffany v. Boatman's Sav. Inst.*, 4 B. R. 601; s. c. 9 B. R. 245; s. c. 1 Dillon, 14; s. c. 18 Wall. 376.

Every case must be decided on its own facts, and it will never be possible to lay down any general formula applicable to all cases. The intent to prefer a creditor necessarily involves the idea of an expectation of paying some others less than their whole debt, and this expectation is not always proved by the proof even of a known insolvency. There must be a fear or anticipation of stopping payment, which, indeed, may often be inferred from insolvency or from acts which have a tendency to produce it, but which is to be decided as a fact in each case. A sweeping rule should not be adopted, prohibiting insolvent persons from borrowing money on a mortgage, even of their stock in trade, or requiring mortgagees to see to the application of the money they lend. *Ex parte Packard*, Lowell, 523.

A sale by an insolvent person, though known to be insolvent, is not therefore necessarily void, otherwise an insolvent person could not lawfully dispose of any of his property. *Babbitt v. Walbrun & Co.*, 6 B. R. 359.

A mortgage made by a debtor to secure the compensation for services to be rendered by an attorney in the preparation of his petition and schedules in bankruptcy is void. A bankrupt can no more execute a conveyance in order to secure a fee to his lawyer than to secure the claims of any other creditor. The claim of a lawyer for professional services, no matter how meritorious or necessary such services may have been, is not a preferred one. *In re Thos. C. Evans*, 3 B. R. 261; *in re Mallory*, 4 B. R. 153; s. c. 2 L. T. B. 130. *Contra*, *in re Sidle*, 2 B. R. 220; *in re Rosenfield*, 2 B. R. 117; s. c. 1 L. T. B. 100; s. c. 8 A. L. Reg. 44; *Triplett v. Hanley*, 1 Dillon, 217.

If an insolvent debtor pays a fee to an attorney for the purpose of hindering, delaying, or impeding the provisions of the act, and the attorney knows that the debtor is insolvent, and that such is his purpose, the fee may be recovered by the assignee. *Goodrich v. Wilson*, 14 B. R. 555; s. c. 119 Mass. 429.

A declaration which avers that the debtor did on a certain day transfer, assign and convey certain property to the defendant, covers any transfer, assignment or conveyance during the six months prior to the filing of the petition. *Andrews v. Graves*, 5 B. R. 279; s. c. 1 Dillon, 108.

When the record of the proceedings in bankruptcy is produced and recognized as in evidence, and no objection is made that they are not formally read or offered in evidence, they are evidence. *Ibid.*

The record of the proceedings in bankruptcy is admissible to show the fact of adjudication and the appointment of the assignee. *Babbitt v. Walbrun & Co.*, 6 B. R. 359.

The record of a suit for an injunction, to which the person making the payment was a party, is competent evidence to establish mala fides in a payment made after the service of an order for an injunction. *Babbitt v. Burgess*, 7 B. R. 561; s. c. 2 Dillon, 169.

Although a register has no authority to take a deposition to be used in a controversy at law between the assignee and a purchaser, yet he has full authority to administer oaths, and when, by the assent of parties, he takes

a deposition to be used as evidence in a cause, the same becomes a sworn statement made in the case to be used as evidence therein, to which the party causing the same to be taken can not object. The officer ought to cause the same to be transmitted to the court for the benefit of all concerned, and the party at whose instance it was taken can not except thereto nor cause it to be suppressed on the ground of any irregularity or informality. *Andrews v. Graves*, 5 B. R. 279; s. c. 1 Dillon, 108.

When the records are before the court, the judge may state to the jury the date of the filing of the petition in bankruptcy. *Ibid.*

When it is proposed to affect a second vendee, such vendee must be shown to have participated in the original fraudulent sale, or it must be shown that he knew, or at least had reasonable cause to know, the facts which make the first sale fraudulent. The mere fact, without more, that the second vendee knew that the first sale embraced all the stock of the insolvent vendor, is not enough to make his purchase fraudulent in law. The title of the second vendee can only be impeached when it is shown that he participated in the fraudulent sale, or, if this is not shown, then by showing that his purchase was actually *mala fide*; that is, made with knowledge that the sale to the first vendee was fraudulent; and the mere fact that the second vendee knew that the sale to the first vendee was made out of the ordinary course of business, will not alone defeat the title of the second vendee. It is only a circumstance proper as evidence to go to the jury on the question of the bona fides of the purchase by the second vendee. The distinction is to be observed between fraud and the evidence which goes to establish fraud. *Babbitt v. Walbrun & Co.*, 4 B. R. 121; s. c. 1 Dillon, 19; *Rahilly v. Wilson*, 3 Dillon, 420; s. c. 5 C. L. N. 217.

If a mortgage is sustained, an accounting for the transactions connected with it can not take place in a suit brought to set it aside, but must take place in some other suit based upon its validity. *Sedgwick v. Wormser*, 7 B. R. 186.

Where the purchase is joint, the judgment should be joint, and not a separate judgment against each proportioned to the sum which they separately paid for the property. *Schulenberg v. Kabureck*, 2 Dillon, 132.

Act of 1867, § 5130. The fact that such a payment, pledge, sale, assignment, transfer, conveyance, or other disposition of a debtor's property as is described in the two preceding sections is not made in the usual and ordinary course of business of the debtor, shall be *prima facie* evidence of fraud.

Statute revised - March 2, 1867, ch. 176, § 35, 14 Stat. 536.

The words, "sale, assignment, transfer, conveyance," employed in this clause, are of comprehensive import, and embrace almost every disposition of the property, whether absolute or conditional. Both the antecedent paragraphs refer to and are designed to protect the property of the insolvent, and the clause as to fraud is designed to the same end. All these provisions relate to the same subject-matter, viz., the property, and all three aim to protect property of insolvents from fraudulent disposals.



*Scammon v. Cole*, 3 B. R. 393; s. c. 5 B. R. 257; s. c. 2 L. T. B. 103; *Driggs v. Moore, Foot & Co.*, 3 B. R. 602; s. c. 1 Abb. C. C. 440; *Babbitt v. Walbrun & Co.*, 4 B. R. 121; s. c. 1 Dillon, 19.

If a sale is made, not out of the usual course of general trade, but out of the usual course of trade of the debtor; that is, if it is unusual in the time, or place, or character, or quantity of the goods sold, or in other respects, having reference to the then business of the vendor; such facts, as against the vendee, shall be prima facie evidence of fraud in him. In other words, in the absence of counter testimony, it will be presumed that he, at the time of purchase, knew that the vendor was insolvent, and that the vendor was making the sale to prevent all or some portion of his property as the case may be, from passing to his assignee, and so evading and defeating the provisions of the law. But upon an issue of title between the assignee and vendee, it is first incumbent upon the former to show the unusual character of the sale before the presumption of fraud will arise against the vendee. Cases may occur involving all the elements of fraud, so far as the vendor is concerned, and yet be made valid by the palpable presence of good faith in the vendee. In *re Josiah D. Hunt*, 2 B. R. 539; s. c. 1 C. L. N. 169.

The question is not whether such transactions are usual, in the general conduct of business throughout the community, but whether they are according to the usual course of business of the particular person whose conveyance is the subject of investigation. And if it is a departure from his usual and ordinary course of business, the statute intends that the party taking the conveyance from him shall be put upon inquiry. *Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dillon, 186.

To bring this clause into operation it is necessary to show that the transfer was made out of the usual and ordinary course of business of the debtor. It is not enough to show that the general business of the debtor was to sell goods, and that a sale of land is not a sale of goods. Without reference to the general business of the debtor, the transfer must be out of his usual and ordinary course of business in respect to an article of the description of that transferred. *Judson v. Kelty*, 6 B. R. 165; s. c. 5 Ben. 348; s. c. 2 L. T. B. 218; *Tiffany v. Lucas*, 5 B. R. 437; s. c. 8 B. R. 49; s. c. 1 Dillon, 164; s. c. 15 Wall. 410.

A sale of a store for the purpose of curtailing business can not be regarded as a thing out of the usual course of business, so as to be prima facie evidence of fraud. *Sedgwick v. Wormser*, 7 B. R. 186.

A sale in bulk or by wholesale is not in the usual course of the business of a retail merchant, and throws upon the vendee the burden of proof to show its fairness and validity. *Smith v. McLean*, 10 B. R. 260.

ACT OF 1867, § 5130A (June 22, 1874, ch. 390, § 10, 18 Stat. 180). That in cases of involuntary or compulsory bankruptcy, the period of four months mentioned in section five thousand one hundred and twenty-eight [thirty-five] of the act to which this is an amendment, is hereby changed to two months, but this provision shall not take effect until two months after the passage of this act, and in

the cases aforesaid, the period of six months mentioned in said section five thousand one hundred and twenty-nine [thirty-five] is hereby changed to three months, but this provision shall not take effect until three months after the passage of this act.

§ 5131. Any contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void; and any creditor who obtains any sum of money or other goods, chattels, or security, from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security, so obtained, to be recovered by the assignee for the benefit of the estate.

Statute revised — March 2, 1867, ch. 176, § 35, 14 Stat. 536.

A note of which a part of the consideration is an agreement to dismiss proceedings in bankruptcy against the maker, is neither founded upon an illegal consideration, nor void as against the policy of the bankruptcy act. *Replier v. Bloodgood*, 1 Sweeny, 34.

A promise by the bankrupt to pay a note in consideration that the holder would withdraw his opposition to the maker's discharge as a bankrupt, is illegal and void. Even without the statute it would be void. Such a promise is a fraud upon the other creditors, and is contrary to public policy. *Austin v. Markham*, 10 B. R. 548; s. c. 44 Ga. 161; *Rice v. Maxwell*, 21 Miss. 289. Vide *Bell v. Leggett*, 2 Sandf. 450.

A note made by the wife of the bankrupt after his discharge, and passed to a creditor in pursuance of an agreement that he should be paid for assenting to the discharge, is void. *Blasdel v. Fowler*, 120 Mass. 447.

The payments which the law makes void are those which reduce the means of the debtor to pay his debts ratably. A change in the form of his own obligation from an account to a note could not have the effect: neither could the accommodation indorsement with which a friend might favor him. These circumstances work no wrong to the other creditors. A note so indorsed is valid and may be enforced. *O'Connor v. Parker*, 4 B. R. 713; s. c. 23 Mich. 22; *Noble v. Seofield*, 44 Vt. 281; *Dalrymple v. Hillenbrand*, 62 N. Y. 5; s. c. 5 N. Y. Supr. 57; *Boyd v. Parker*, 43 Md. 182.

If a party signs a note as surety, and takes property from the principal to indemnify him for his liability, the fact that the property is subsequently taken from him by the assignee of the principal, on the ground that the transfer was void under the bankruptcy law, does not constitute a valid defense to the note. *Noble v. Seofield*, 44 Vt. 281.

If a note is given upon the consideration or with the intent specified in this section, it is void even in the hands of a bona fide holder, for no exception is made in favor of innocent holders of negotiable securities made in

violation of the law. *Dalrymple v. Hillenbrand*, 62 N. Y. 5; s. c. 5 N. Y. Supr. 57.

A note given by a third person, without the knowledge or intervention of the bankrupt, to induce a creditor to withdraw his objections to the bankrupt's discharge, is founded on an illegal consideration, and is void. *Bell v. Leggett*, 7 N. Y. 176.

A note given in consideration of a promise by the payee to dismiss proceedings in bankruptcy instituted by him, and to procure the assent of other creditors to a composition for a less sum than he receives, can not be enforced against the indorser if the promise is not performed. *Clafin v. Torlina*, 11 B. R. 521; s. c. 55 Mo. 569.

An agreement between creditors who have received preferences to contribute proportionately such sum as may be necessary to induce other creditors to forbear to put the debtor into bankruptcy, is valid. *Perryman v. Allen*, 15 B. R. 113; s. c. 50 Ala. 573.

An agreement by a debtor to consent to an adjudication of bankruptcy, and to procure the consent of his copartners to an adjudication against the firm, is not in fraud of the bankruptcy law, and the debtor may recover the consideration therefor. *Sanford v. Huxford*, 32 Mich. 313.

ACT OF 1898, CH. 2, § 10. \* \* \* **Extradition of Bankrupts.**—(a) Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

ACT OF 1898, CH. 4, § 20. \* \* \*. **Affirmation.**—(b) Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

§ 29. **Offenses.**—(a) A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

(b) A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used

any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

(c) A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

(d) A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

The bankruptcy act does not forbid the creditor to take any contract, covenant or security from a third party as an inducement to forbear instituting proceedings against his debtor; but to constitute the forbearance a valid consideration for such contract or security the creditor must at the time of receiving it have a right to proceed in bankruptcy against his debtor. *Ecker v. Bohn*, 16 B. R. 544.

Act of 1867, § 5132. Every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or upon that of a creditor:

First. Who secretes or conceals (a) any property belonging to his estate; or,

Second. Who parts with, conceals, destroys, alters, mutilates, or falsifies, or causes to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto; or,

Third. Who removes, or causes to be removed, any such property or book, deed, document, or writing out of the district, or otherwise dispose of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay him in recovering or receiving the same; or,

Fourth. Who makes any payment, gift, sale, assignment, transfer, or conveyance, (b) of any property belonging to his estate with the like intent; or,

Fifth. Who spends any property belonging to his estate in gaming; or,

Sixth. Who, with intent to defraud, willfully and fraudulently conceals from his assignee, or omits (c) from his inventory, any property or effects required by this Title to be described therein; or,

Seventh. Who, having reason to suspect that any other person has proved a false or fictitious debt against his estate, fails to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or,

Eighth. Who attempts to account for any of his property by fictitious losses or expenses; or,

Ninth. Who, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense (d) of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud; or,

Tenth. Who, within three months next before the commencement of proceedings in bankruptcy, with intent to defraud his creditors, pawns, pledges, or disposes of, (e) otherwise than by transactions made in good faith in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for,

Shall be punishable by imprisonment, with or without hard labor, for not more than three years.

Statute revised — March 2, 1867, ch. 176, § 44, 14 Stat. 539. Prior Statute — April 4, 1800, ch. 19, § 23, 2 Stat. 28.

(a) A person is not criminally liable for the payment of fair current expenses for the support of his family between the commencement of proceedings in bankruptcy against him and the final adjudication. *In re Brooks*, 5 Pac. L. R. 191.

If the bankrupt has been examined before the register in regard to the property which is charged to have been concealed, no demand before the indictment is necessary. *U. S. v. Smith*, 13 B. R. 61.

(b) The gist of the offense created by this clause is a conveyance with intent to keep property from an assignee in bankruptcy, and the offense can not be committed unless proceedings in bankruptcy have been commenced in a court of competent jurisdiction, in which an assignee can be appointed. An indictment for a misdemeanor must state an offense, and must convey to the accused the information necessary to enable him to make his defense. A mere averment of the commencement of proceedings in bankruptcy, pursuant to the act, without in any way describing the proceedings, except by the names of the creditors, and the words "pursuant to the act," is insufficient, for it does not state a time, nor a place, nor a tribunal before which the alleged proceedings in bankruptcy were taken, subsequent to which and with reference to which the accused made the

alleged conveyance of property, nor allege any adjudication or proceedings in bankruptcy before a court of competent jurisdiction, nor set forth any facts from which it can be seen that any court had jurisdiction of the proceedings alluded to. *U. S. v. Latorre*, 8 Blatch. 134.

(c) This clause is not qualified by the original limitation of time. It is a new division of the subject, and one which requires no such limitation, because the prohibited act can not be committed before bankruptcy. The offense is complete if a bankrupt fraudulently omits from his schedule any property or effects with the designated intent. It is complete without a final examination. In practice, there is no last examination in bankruptcy, nor any examination at all, unless specially ordered. When the indictment does not on its face show that the defendant was a citizen of the United States, it need not aver that he took the oath of allegiance. If the defendant was a citizen, and neglected to take the oath, he must show it in defense. *U. S. v. Clarke*, 4 B. R. 59; s. c. 1 L. T. B. 237; s. c. 3 L. T. B. 223.

The proceeding may be by information and not indictment. *U. S. v. Black*, 9 C. L. N. 234.

(d) Neither as to the proceedings nor jurisdiction of the court in bankruptcy is it sufficient in an indictment, under the act, to rely merely upon a general averment. All matters necessary to constitute the offense must be pleaded. It is not sufficient to aver that proceedings in bankruptcy were duly commenced. It must be pleaded and proven, in order to convict, that a petition in bankruptcy was presented to the district court by a certain creditor, naming him, and also the amount of the debt of such petitioning creditor, and the alleged case of bankruptcy, and the adjudication of bankruptcy. It must appear affirmatively that the petitioning creditor had a right, under the law, to commence and prosecute proceedings in bankruptcy. The amount of his debt must appear, otherwise the court would have no jurisdiction. It must appear that the bankrupt obtained goods within three months of the bankruptcy by means of a representation, which he knew to be false, that he was carrying on business and dealing in the ordinary course of trade, and such representation must actually be made by him. The description of the goods obtained by the defendant should state a certain number of packages, instead of a large quantity. This can be ascertained from the bills of sale. The description of the goods in an indictment should be as definite as in a declaration in trover. The word feloniously should be omitted. The offenses made indictable are misdemeanors. And in drawing indictments, figures for dates should not be used. *U. S. v. Prescott et al.*, 4 B. R. 112; s. c. 2 Abb. C. C. 169; s. c. 2 Biss. 325; s. c. 2 L. T. B. 184.

To constitute the offense the accused must:

1. Obtain goods and chattels from some person or persons on credit, under the false pretense of carrying on business and dealing in the ordinary course of trade.
2. Such credit must be obtained within three months before the commencement of proceedings in bankruptcy.
3. Such goods and chattels must be obtained on credit as aforesaid with intent to defraud.

When there is a several finding on each count, the verdict can not be set aside if either of the counts is good. *U. S. v. Clark*, 4 B. R. 56; s. c. 1 L. T. B. 237; s. c. 3 L. T. B. 223.

The making of a fraudulent chattel mortgage renders a party liable under this provision. *U. S. v. Bayer*, 13 B. R. 88.

It is not necessary that the goods which have been fraudulently disposed of shall have been obtained within three months before the commencement of the proceedings in bankruptcy. *U. S. v. Smith*, 13 B. R. 61.

The intent to defraud may be established by facts and circumstances. *U. S. v. Penn*, 13 B. R. 464.

The intent to defraud may be inferred from all the circumstances of the case. *U. S. v. Smith*, 13 B. R. 61; *U. S. v. Bayer*, 13 B. R. 88.

It must be shown that the intent existed in the mind of the defendant at the time the sale was made. *U. S. v. Penn*, 13 B. R. 464.

Every man is presumed to intend the usual and ordinary consequences of an act. *U. S. v. Smith*, 13 B. R. 61.

When the government introduces evidence tending to prove that the defendant left the State with the intention of remaining absent therefrom, the defendant may prove that while on the journey he stated his intention to return. *U. S. v. Penn*, 13 B. R. 464.

The defendant may put in evidence his former good character in relation to the particular crime with which he stands charged. *Ibid.*

An examination of a witness taken before a commissioner upon an issue contained in one of the counts is admissible if he has since died. *Ibid.*

Quære, Can Congress legislate for frauds committed by a debtor on a single creditor within the same State, unless the act relates to bankruptcy or to some other matter within the Federal jurisdiction? *U. S. v. Clark*, 4 B. R. 59; s. c. 1 L. T. B. 237; s. c. 3 L. T. B. 223.

Among the powers of Congress enumerated in the Constitution are the powers "to establish uniform laws on the subject of bankruptcies throughout the United States," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof." If this clause is a law "necessary and proper" for carrying the bankruptcy law into effect, it comes within the latter power named, and is constitutional. The subject of bankruptcy, in a general sense, concerns the relation of debtor and creditor, and, in a particular and no doubt stricter sense, concerns such relation in cases where the debtor is unable or unwilling to pay his debts. Laws upon that subject have for their object the appropriation, either voluntarily or by compulsion, of the debtor's property to the payment of his debts pro tanto or in full, as the case may be, and the relief of honest debtors. To accomplish this object, these laws are made to operate upon, affect, and control the relations of the parties so as to limit and circumscribe the rights of the debtor in, and his control over, his property, and the rights of others dealing with him in regard thereto, in many particulars, before any proceedings in bankruptcy shall have been commenced by or against such debtor. The meaning of the words "necessary and proper" has been judicially determined by the supreme court to be "needful," "requisite," "essential."

“conducive to.” The end sought by a bankruptcy law is the appropriation of the debtor's property to the payment of his debts. This clause is for the prevention of frauds by debtors on their creditors, by which that end may be defeated or impaired, and is clearly conducive and plainly adapted to the end sought. The proceedings in bankruptcy merely constitute the machinery by which the appropriation of the debtor's property to the payment of his debts is attained. The prevention of the fraud denounced by the clause being conducive to that end, it makes no difference whether it relates to a fraud committed before or after the machinery provided for the accomplishment of the end is set in motion. A debtor may or may not be a bankrupt. From the fact that both words “debtor” and “bankrupt,” are used, and in the disjunctive, it must be held that the former is used in the clause as descriptive of a person who is a debtor, but who has not at the time of committing the offense become a bankrupt. The “subject of bankruptcies,” however, as used in the Constitution, concerns the relation of debtor and creditor. The provision in regard to the time is merely a limitation. The act which the clause purports to punish is an offense the moment it is committed. *U. S. v. Pusey*, 6 B. R. 284; *s. c.* 6 L. T. B. 184.

The duty of a commissioner is narrowed to the single inquiry, not whether there is sufficient legal evidence to convict and imprison the accused, but whether there is a *prima facie* case. If probable cause is shown to justify the belief that the accused has committed the crime charged, he should be committed for trial. *U. S. v. Thomas*, 7 B. R. 188.

If the bankrupt and other persons conspire to commit the acts made criminal by this section and either does any act in pursuance of such conspiracy to effect its object, they are liable to indictment under section 5440. *U. S. v. Bayer*, 13 B. R. 400.

ACT OF 1898, CH. 4, \* \* \*. § 30. **Rules, Forms, and Orders.**—(a) All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

The general rules and orders made by the supreme court, under authority of the bankruptcy law, were designed to systematize and facilitate the practice of the bankruptcy courts, and so far as they apply must be strictly followed; but they were not designed to, nor do they, create or declare the rights of creditors in the estates of bankrupts, still less do they abrogate and annul those rights. *In re Baxter & Ralston*, 18 B. R. 560.

ACT OF 1898, CH. 1, § 71. **The Time when This Act Shall go into Effect.**—(a) This Act shall go into full force and effect upon its passage: *Provided, however*, That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.





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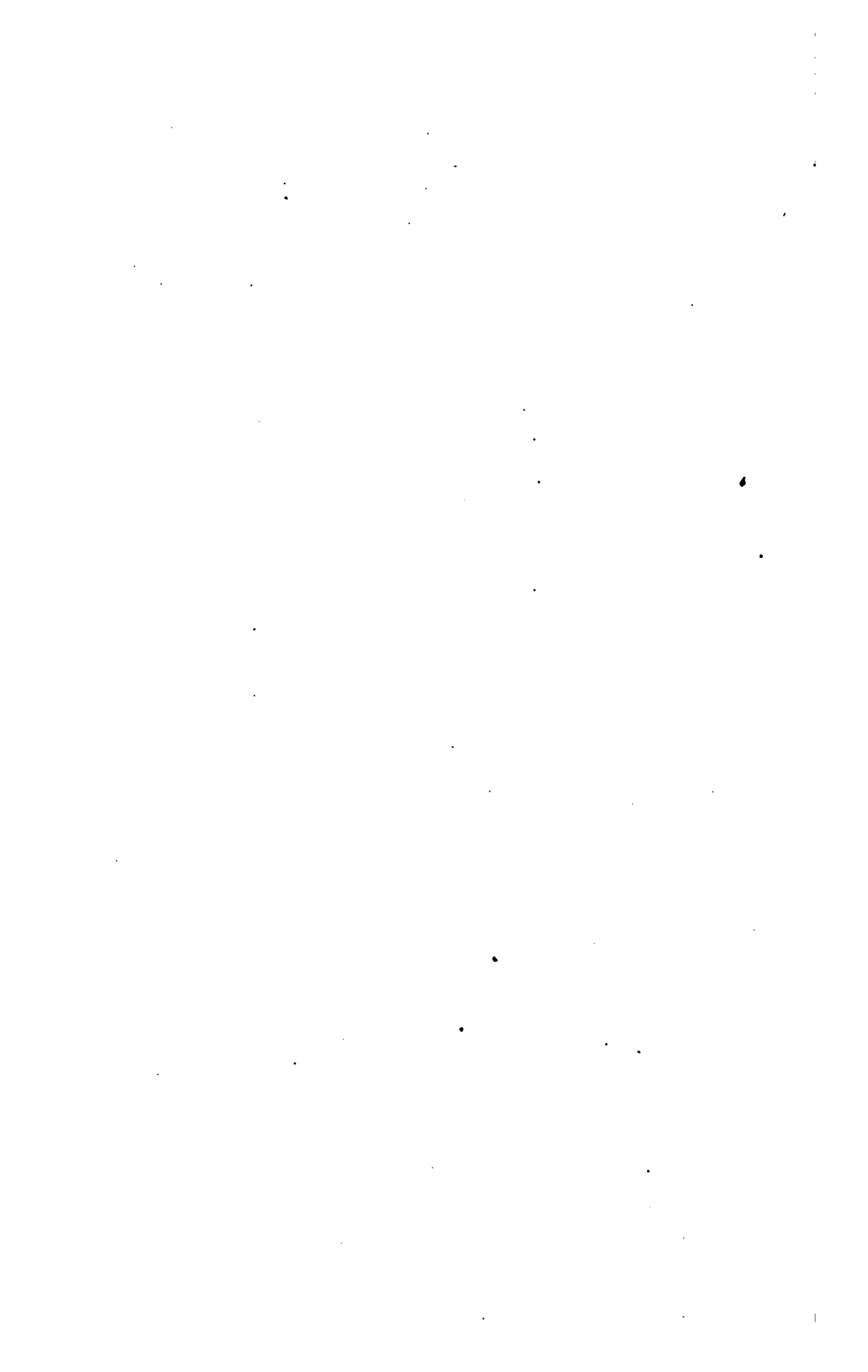
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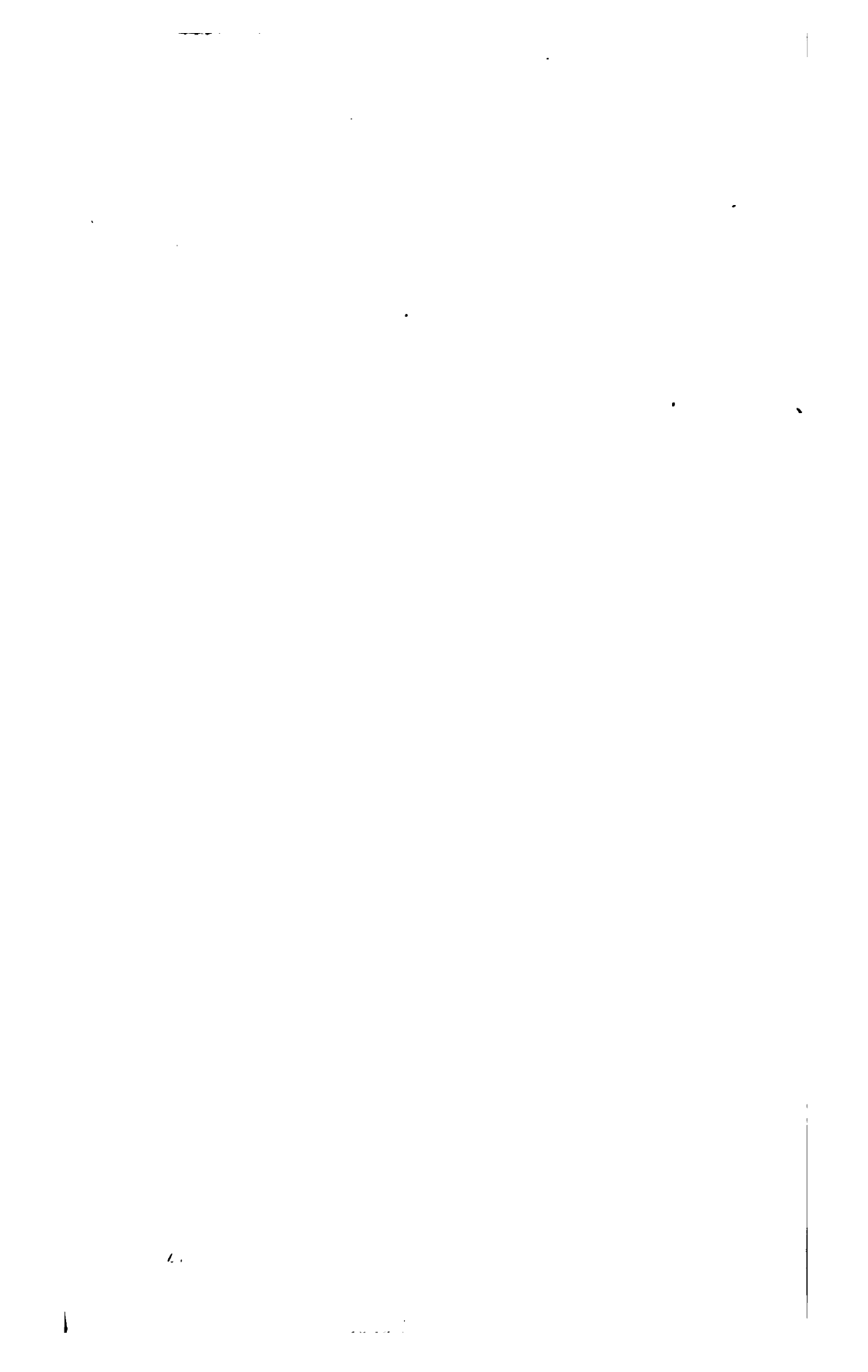
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